FILED

No. 01 636 OCT 11 2001

OFFICE OF THE CLERK

IN THE

SUPREME COURT of the UNITED STATES

Arthur Best and Debra Best

Plaintiffs-Appellant

vs.

Sears Roebuck and Co., Waterloo Industries, Inc., Masterbrands Industries, Inc., and American Brands, Inc.,

Defendants-Appellee

and

Arthur Best and Debra Best

Plaintiff-Appellant

vs.

Law Firm of Queller and Fisher and Fred Queller, Individually, Jointly and Collectively

Defendant-Appellee

Petition For Writ Of Certiorari
From The State Supreme Court Of New York

Arthur Best and Debra Best
Pro se for Appellant
70 N. Main Street
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Tel: 516-378-2600

127 pp

Questions for Review

Constitutional Due Process

1. Does fraud by officers of the court deny a federal right when alleged and disregarded by the Court without a meaningful hearing after presentation of the facts in written pleading?

2. Does fraud upon the court by officers of the court result in void judgment or orders issuing from that court thereafter?

3. Is the knowing violation of a constitutional right by a judge ever justified?

4. At what point does denial of access to the court become a denial of a basic constitutional right?

5. Does Ex-parte Young really apply to anyone who violates another persons constitutional rights under color of law?

6. Does the holding of a pro se litigant to the standards of a practicing lawyer constitute an act of discrimination toward the pro se litigant?

7. Does due process protect a civil pro se litigant against judicial action intended as penalty for exercise of pro se litigant's constitutional rights?

8. Does a judges partiality, when the nature of the bias is personal, require the judge to disqualify himself?

9. Is the right to a fair and impartial judicial hearing a basic requirement of due process?

List of Parties

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Freeport, N.Y., 11520
Tel: 516-378-2600

Arthur Best
Pro Se For Appellant

Debra Best
Plaintiff/Appellant
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Tel: 516-378-2600

Debra Best
Pro Se For Appellant

Sears Roebuck and Co.,
Waterloo Industries, Inc.,
Masterbrands Industries,
Inc., and American Brands, Inc.,

L'abatte, Balkin, Colavita
& Contini, LLP.
Attorney for Appellee
1050 Franklin Ave., 4th
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Garden City, NY, 11530
Tel: 516-294-8844

Queller & Fisher Law
Firm and Fred Queller
Defendant/Appellee
110 Wall Street, 26th Floor
New York, NY 10005
Tel: 212-422-3600

Bivona & Cohen
Attorney for Appellee
88 Pine Street
New York, NY 10006
Tel: 212-363-3100

Table of Authorities

General Application of Constitutional & Federal Law

U.S. Constitution, Amendment V, XIV
Supremacy Clause under Article VI, Cl 2
Statute At-Large 13
Title 42 USCA 1983, 1985 et.al
Title 28 Section 453
Title 28 Chapter 21 Section 455(a)
New York Constitution and Bill of Rights, Section 6 and 11

General Supporting Case Law For Argument

Ex parte Newman, 9 Cal 502
Ex parte Andrews 18 Cal 678
United States v. Sprague, 282 US 716, 51 S. CT 220
Sandelin v. Collins, 1 Cal2d 147
Ervin v. Collins 85 So 2d 852
Puckett v. Cox, 456 F2d 233 (1972 Sixth Circuit USCA)
Conley v. Cox, 355 U.S. 41 at 48 (1957
Lewis v. Superior Court, 21 Cal. App.2d 102,104,78 P.2d 220,222 (1937
Scheuer v. Rhodes, 416 U.S. 232, 94S.Ct. 1683, 1687 (1974)
Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987)
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed, 1250 (1944)
Pulliam v. Allen, 466 U.S. 522 (1984) 82 S Ct. 1432
Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885)
Truaz v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed 254 (1921)
Ex parte Young, 209 U.S. 123 (1908)
Davis v. Board of School Commissioners, Court of Appeals 5th, 1975, 517 F.2d 1044, 1052 Cert. Denied 96 S. Ct. 1685
United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 26 (1973).
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983)
All case law offered in Plaintiff Index Exhibit A55-66

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Exhibits

Orders.....O1-O9
Appendages.....A1-A59

Citations of Official Reported Opinions

July 13, 2001:	Index Exhibit #O-1
March 14, 2001	Index Exhibit #O-2
March 14, 2001	Index Exhibit #O-2A
December 26, 2000:	Index Exhibit #O-3
December 18, 2000:	Index Exhibit #O-4
July 24, 2000	Index Exhibit #O-5
July 13, 2000	Index Exhibit #O-6
October 14, 1999	Index Exhibit #O-7
August 5, 1999:	Index Exhibit #O-8
March 24, 1999:	Index Exhibit #O-9

Statement of Jurisdiction

This Petition for Certiorari is timely filed under Rule 13 and Title 28 Sec. 1257. The matters are timely within ninety days of the most recent order filed on July 13, 2001. Appellant is seeking writ of certiorari from an order dismissing appeal from the New York State Supreme Court. The review sought is for violation of civil and constitutional rights.

The basis of the Petition is fraud upon the court by officers of the court which was disregarded by the court and denial of a meaningful hearing on the issue of fraud upon the court.

The final and most recent order sought to be reviewed was entered on July 13, 2001 from the State Supreme Court of New York.

Constitutional Provisions

U.S. Constitution, Amendment V, XIV , Due Process and Equal Protection
U.S. Constitution, Amendment IX, X, Right to Pro Se Representation
Supremacy Clause under Article VI, Cl 2, Due Process
Statute At-Large 13, Due Process
Title 42 USCA 1983, 1985 et.al, Violation of Constitutional Right Und Color Of Law
Title 28 Section 453, Due Process
Title 28 Chapter 21 Section 455(a), Due Process
New York Constitution and Bill of Rights, Section 6 and 11, Due Process

Statement of the Case

The underlying case is a personal injury case (Best v. Sears, et al) wherein appellant lost total eyesight in one eye. After a proposed settlement, a fee dispute with Appellant's law firm arose. Appellant made an Entry of Appearance pro se and asked the Court (Supreme Court Of New York, County of Nassau) to escrow disbursement funds until the fee dispute was resolved through negotiation or separate litigation.

The Court assumed subject matter jurisdiction of the fee dispute issue with no litigation or hearing on merits despite requests from Appellant for at least a meaningful hearing of the issues alleging fraud.. Appellant's called to the attention of the Court the fraud being perpetuated upon the Court by the law firm in their pleadings addressing the issue. The Court disregarded the fraud allegations without a hearing and rendered a decision on the fee dispute issue under threat of sanctions to the Appellant. **(See Appendix #O-9)** Appellant filed a motion for reconsideration with that Court offering new evidence and that motion was denied. **(See Appendix #0-8)**

Appellant then filed a malpractice and other issues lawsuit (Best v. Queller, et al) Supreme Court County of

Nassau). The same judge presiding in the (Best v. Sears, et al) case took jurisdiction of the malpractice lawsuit, dismissing on a motion for summary judgment based upon his prior ruling of the fee dispute in the first case. **(See Appendix #O-7)**

Appellant then filed an appeal to the New York State Supreme Court. That court denied the appeal. **(See Appendix #0-3 and # 0-4)** Appellant then filed a motion for reconsideration under rule 60 (B). That motion was denied and a final order of that Court was issued on July 13, 2001. **(See Appendix #0-1)**

Appellant seeks writ of certiorari in this Court on the recent order New York State Supreme court and all other orders issuing from the Courts in these related cases.

Statement of Material Facts for Consideration

Background

The Orders being appealed arise out of an underlying case involving personal injury, resulting in a loss of one eye of Appellant Arthur Best and the subsequent representation of Appellant by the law firm of Queller and Fisher, a New York law firm, in a personal injury lawsuit against defendants in that underlying case.

When it appeared Queller and Fisher was pushing for a settlement instead of a trial on merits, the lawsuit was settled by Appellant without benefit of counsel present. At a settlement conference presided over by the judge of record, only the general statement of fees owed Queller and Fisher was listed without amount. Subsequent to this conference and at the time of proposed disbursement of the proceeds of the settlement, a dispute arose over the disbursement amount claimed by Queller and Fisher Additionally, Plaintiff discovered that Queller and Fisher had not factored in the economic losses caused by the injury, as a part of the proposed settlement offer to the Defendants. Plaintiff, a hands-on type person in a heavy equipment servicing business requiring hands-on operation has virtually lost his successful business after this accident. This led to one of the allegations in a

legal malpractice lawsuit against Queller and Fisher, for failure to allege and investigate Plaintiff's economic damages. (See **Appendix # A1-22)** An expert estimated the Economic loss alone would range from $3 to $5 million and that estimate has become factual.

This dispute between Appellant and the Queller and Fisher law firm led to a request by Appellant for the Court to escrow disbursements until the fee dispute could be resolved.

The Court assumed subject matter jurisdiction of the fee dispute issue with no litigation or hearing on merits despite requests from Appellant for at least a meaningful hearing of the issues alleging fraud. Appellant's called to the attention of the Court the fraud being perpetuated upon the Court by the law firm in their pleadings addressing the issue. The Court disregarded the allegation of fraud upon the court and rendered a decision on the fee dispute issue under threat of sanctions to the Appellant. (See **Appendix #0-9)** Appellant filed a motion for reconsideration with that Court offering new evidence and that motion was denied **(See Appendix #O-8).** Appellant then filed a malpractice and other issues lawsuit (Best v. Queller, et al) Supreme Court County of Nassau. **(See Appendix #A1-22).** The same judge presiding in the (Best v. Sears, et al) case took jurisdiction of the malpractice

lawsuit, dismissing on a motion for summary judgment based upon his prior ruling of the fee dispute in the first case disregarding five other causes, stating that these all related to legal malpractice.**(See Appendix #O-7).**

Appellant then filed an appeal to the New York State Supreme Court. **(See Appendix #A23-47 and A48-59)** That court denied the appeal. **(See Appendix #O-3)** Appellant then filed a motion for reconsideration under rule 60 (B). That motion was denied and a final order of that Court was issued on July 13, 2001. **(See Appendix #0-1)**

Appellant seeks writ of certiorari in this Court on the recent order New York State Supreme court and all other orders issuing from the Courts in these related cases.

Facts Material To Issues

1. Fraud Upon the Court by Officers of the Court

Fraud by officers of the Court upon the Court on this issue with a government official joining first raised in the lower court **(See Exhibits #A23-47 and A48-59).**

2. Void Judgments and Orders

Plaintiff argued in their appeal that the subject fraud upon the court raised by the Plaintiff /Appellant caused all subsequent orders of the court to be void, including the orders being appealed

from. Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987) also Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct.997, 88 L.Ed. 1250 (1944)

3. Knowing Violation of Constitutional Right by Judge

The lower court erred, made serious mis-statement of facts in it's order **(See Exhibit #0-9)** and abused it's discretion-even it's jurisdiction in denying Plaintiff a meaningful hearing on the subject of fee dispute with their law firm. The court's arbitrary ruling avoiding a hearing and decision on merits-served to start a domino effect of legal injustice even as a bar to the cause of legal malpractice and other issues in a separate lawsuit. These constitutional abuses to Plaintiff in the underlying court can only be placed in perspective after a full review of the Appellant appeal in front of this court.

4. Denial of Basic Constitutional Right to Access to the Courts

This first action ultimately led to Appellant's filing of a legal malpractice and other causes lawsuit, **(See Appendix # A1-22)** adjudicated without oral argument and decided by the same judge with numerous mis-statement of facts, in the order, indicating either a lack of understanding of the facts, or in the

alternative, a discrimination against the Appellant in his pro se representation vs a lawyer, denying Appellant status and standing as a pro se litigant. **(See Appendix #0-9)**

Additionally, Plaintiff discovered that Queller and Fisher had not factored in the economic losses caused by the injury, as a part of the proposed settlement offer to the Defendants. Plaintiff, a hands-on type person in a heavy equipment servicing business requiring hands-on operation has virtually lost his successful business after this accident. This led to one of the allegations in a legal malpractice lawsuit against Queller and Fisher, for failure to allege and investigate Plaintiff's economic damages. **(See Appendix #A1-22)** An expert estimated the Economic loss alone would range from $3 to $5 million and that estimate has become factual. Factually, the judge denied Appellant his basic right to access to the courts on these issues by dismissal without any meaningful hearing.

The defendant/appellee in this case attempted to deny not only Appellants malpractice and other causes lawsuit in the lower court but also his appeal. This was joined by the Judge in the case, which is a clear attempt to deny constitutional right to access to the court. See United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 26 (1973). also Ryland v. Shapiro, 708 F.2d 967

(5th Cir. 1983). In Ryland, Plaintiff commenced an action in federal district court asserting a Title 42 U.S.C. 1983 claim. The district court granted the defendants Rule 12(b)(6) motion to dismiss and Plaintiff appealed. The Fifth Circuit reversed, concluding the Defendants had burdened the Plaintiffs' right of judicial access. Such has been the activity in this case.

5. The Courts Interpretation of Ex-Parte Young

Appellant alleges numerous constitutional rights violations in the lower court (New York Supreme Court County of Nassau) by a Judge acting under color of law. This Court has cited Ex-Parte Young in its rulings. Ex-Parte Young either applies to this case or it has no literal meaning. Ex parte Young, 209 U.S. 123 (1908), teaches that when a state officer acts under color of law in a manner violative of the Federal Constitution, he; "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Id., at 159-160. (Emphasis supplied.)

6. Discrimination Toward a Pro Se Litigant

When a non-lawyer pro se litigant pursues his or her case in the courts should they be held to the same standards as a practicing lawyer. A non-lawyer pro se litigant cannot be admitted to the Bar to practice because they do not meet the formal standards to practice, as do lawyers. Should they then be held to the same standards as a practicing lawyer in the courts? Under the definition of equal protection of the law there has to be a similar standard requirement. See U.S. Constitution, Amendment V, XIV Even though a non-lawyer pro se litigant has a basic constitutional right to access to the courts, should they be told to go and hire an attorney? When they do not hire an attorney, should they then be discriminated against by the court for exercising their basic constitutional right and be subject to punitive orders and judgments as in this case? See Title 28 Chapter 21 Section 455(a)

7. Due Process Violations

The underlying court (New York Supreme Court County of Nassau) denied Appellant a meaningful hearing on the serious issue of fraud upon the court, denied a meaningful hearing on the fee dispute, denied Appellant the opportunity to present a full and complete submission of new or additional evidentiary material, denied consideration of the evidentiary material in front of the

court and in effect denied Appellant their Constitutional right to due process rights. See U.S. Constitution, Amendment V, XIV

8. Personal Bias of Judge Requires Recusal From Case

Personal bias can easily be distinguished from judicial bias any judge reflecting that personal bias. Appellant raised the personal bias issue in the lower court. See 28 USC 455(a) as amended in 1974 provides that any judge of the United States Court system shall disqualify himself "In any proceeding in which his impartiality might reasonably be questioned." The 1974 amendment changed the rule substantially; See Davis v. Board of School Commissioners, Court of Appeals 5th, 1975, 517 F.2d 1044, 1052 Cert. Denied 96 S. Ct. 1685. Appellant was victimized by the personal bias of the New York State Supreme Court County of Nassau; The Court denied Appellant a meaningful hearing on the serious issue of fraud upon the court (See Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987) (Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)) denied a meaningful hearing on the fee dispute, denied Appellant the opportunity to present a full and complete submission of new or additional evidentiary material (Scheuer v. Rhodes, 416 U.S. 232, 94S.Ct. 1683, 1687 (1974)) denied consideration of the

evidentiary material in front of the court and in effect, denied, basic access to the Court to sue a lawyer for his transgressions and in effect denied Appellant their Constitutional rights to due process because of personal bias toward a non-lawyer v. lawyer.

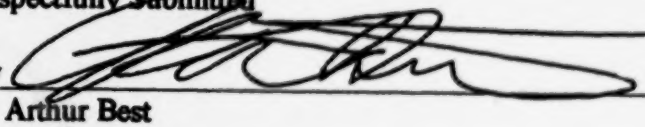
Argument For Reasons Relied Upon For Writ

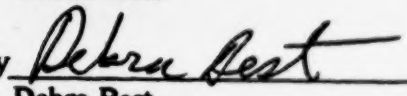
1. A state court of last resort has decided several important questions of federal and constitutional law which conflicts with the decisions of this Court as pertains to fraud upon the Court by officers of the court and due process rights. (See Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987) (Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

2. A state Court of last resort so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

SIGNATURE PAGE FOR PETITION

Respectfully Submitted

By 
Arthur Best

By 
Debra Best

Pro se for Appellants
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Tel: 516-378-2600

INDEX OF EXHIBITS TO PETITION FOR WRIT

Citations and Orders

Order July 13, 2001:	Index Exhibit #O-1
Order March 15, 2001	Index Exhibit #O-2 & O-2A
Order December 26, 2000:	Index Exhibit #O-3
Order December 18, 2000:	Index Exhibit #O-4
Order July 24, 2000	Index Exhibit #O-5
Order July 13, 2000	Index Exhibit #O-6
Order October 14, 1999	Index Exhibit #O-7
Order August 5, 1999:	Index Exhibit #O-8
Order March 24, 1999:	Index Exhibit #O-9

Supreme Court of The State Of New York, County of Nassau, Appellant Pleading Exhibits Case #1999-10393

Index Exhibit #A1-22 (12/24/98) Appellant Filing of Legal Malpractice lawsuit.

New York State Supreme Court, 2nd Division, Appellant Pleading Exhibits on Case 1999-10393 and 1999-10398

Index Exhibit #A23-47 (4/15/00) Appeal to Supreme Court State of New York, Appellate Division case 10393. Dismissed (See Index Exhibit #0-3) Motion For Reconsideration filed. Dismissed and denied (See Index Exhibit 0-1)

Index Exhibit #A48-59 (4/15/00) Appeal to Supreme Court State of New York, Appellate Division case 10398. Dismissed (See Index Exhibit #0-4) Motion for Reconsideration filed. Dismissed and denied (See Index Exhibit 0-1)

COPY O-1

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

92370
O/cf

FRIED T. SANTUCCI, *J.P.*
MYRIAM J. ALTMAN
GLORIA GOLDSTEIN
LEO F. McGINITY, 11.

1999-10398
Arthur Best, et al., appellants, v Sears Roebuck & Co., et aL, respondents; Queller & Fisher, et al., nonparty-respondents.

DECISION & ORDER ON MOTION

Motion by the appellants for reargument of an appeal from an order of the Supreme Court, Nassau County, dated August 5, 1999, which was determined by decision and order of this court dated December 18, 2000, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court, and cross application by the nonparty-respondents for sanctions.

Upon the papers filed in support of the motion and cross application and the papers filed in opposition thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that the cross application is granted to the extent that the nonparty-respondents are awarded $160 in costs, and the cross application is otherwise denied. SANTUCCI, J.P., ALTMAN, GOLDSTEIN and McGINITY, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

July 13, 2001

BEST v SEARS ROEBUCK & CO.

COPY #O-2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

5891G
U/mm

FRED T. SANTUCCI, J.P.
MYRIAM J. ALTMAN
GLORIA GOLDSTEIN
LEO F. McGINITY, JJ.

1999-10393
Arthur Best, et al, appellants, v
Law Firm of Queller and Fisher, et al., respondents.

DECISION & ORDER ON MOTION

Motion by the appellants for reargument of an appeal from an order of the Supreme Court, Nassau County, dated October 14, 1999, which was determined by decision and order of this court dated December 26, 2000, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court, and cross application by the respondents for an award of costs and an attorney's fee.

Upon the papers filed in support of the motion and cross application and the papers filed in opposition thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that the cross application is granted to the extent that the respondents are awarded $100 in costs, and the cross application is otherwise denied.

NTUCCI, J.P., ALTMAN, GOLDSTEIN and McGINITY, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

BEST v LAW FIRM OF QUELLER AND FISHER

March 14, 2001

COPY #O-2A

SUPREME COURT OF TEE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

5887G
U/mm
FRED T. SANTUCCI, J.P.
MYRIAM 1. ALTMAN
GLORIA GOLDSTEIN
LEO F. McGIN7ITY, 11.

1999- 10398

DECISION & ORDER ON MOTION
Arthur Best, et al., appellants, v Sears Roebuck & Co., et al., respondents; Queller & Fisher, et al., nonparty-respondents.

Motion by the appellants for reargument of an appeal from an order of the Supreme Court, Nassau County, dated August *5*, 1999, which was detennined by decision and order of this court dated December 18, 2000, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court, and cross application by the nonparty-respondents for an award of costs and an attorney's fee.

Upon the papers filed in support of the motion and cross application and the papers filed in opposition thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that the cross application is granted to the extent

that the nonparty-respondents are awarded $100 in costs, and

the cross application is otherwise denied.

SANTUCCI, J.P., ALTMAN, GOLDSTEIN and McGINITY, JJ., concur.

ENTER:
James Edward Pelzer
Clerk

March 14, 2001
BEST v SEARS ROEBUCK & CO.

COPY #O-3

SUPREME COURT OF TEE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

3893B
C/hu

_____AD2d _____

FRED *T.* SANTUCCI. *JP.*
MYRIAM *3.* ALTMAN
GLORIA GOLDSTEIN
LEO F. McGINITY, 35.

Submitted November 30. 2000

1999-10393

Arthur Best. et al., appellants, v
Law Firm of Queller and Fisher, et a]., respondents.

Arthur Best and Debra Best, appellants pro se
L'Abbate, Balkan, Co]avita & Contini, liP, Garden City. N.Y. (Matthew K. Flanagan of counsel), for respondents.

In an action, *inter alia.* to recover damages for legal malpractice, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Alpert, 3.), dated October 14. 1999, which granted the defendants' motion for summaiy judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

In a prior proceeding, the Supreme Court found that the defendants in this action, who were the attorneys for the plaintiffs in that proceeding, were entitled to their agreed-upon legal fee, Inasmuch as that determination necessarily decided that there was no malpractice, the plaintiffs are precluded *from* asserting a cause of action alleging malpractice *(see, Kagan Meat S Poultry v falter,* 70 AD2d 632).

Moreover, the Supreme Court properly dismissed the causes of action alleging fraud and breach of contract and for indemnification, since these arise from the same facts as the malpractice cause of action, and thus are duplicative of that cause of action *(see. Mecca v Shang._258* Afl2d *569)*

SANTUCCI, J.P., ALTMAN, GOLDSTEIN and McGINITY, JJ.. concur.

ENTER:

James Edward Pelzer
Clerk

December 26. 2000

BEST v LAW FIRM OF QUELLER AND FISHER

COPY #O-4

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND *JUDICIAL* DEPARTMENT

37903
Y/j v

Submitted -. November 30, 2000

_____ AD2d _____

FRED T. SANTUCCI. iF.
MYRIAM 3. ALTMAN
GLORIA GOLDSTEIN
LEO F. McGINITY, 55.

1999-10398
Arthur Best. et *al.*, appellants. v Sears
DECISION & ORDER
Roebuck & Co., ci at, respondents;
Queller & Fisher, et a]., nonparty-respondents.

ORDERED that the appeal is dismissed, with costs.

The plaintiffs' motion was not based upon new evidence which was unavailable at the time of the original motion. Thus, it was actually a motion for reargurnent *(see,, Citibank v Olson,* 204 AD2d 381; *Chinrehui* v *Quitoai,* 178 AD2d 500). The appeal must therefore be dismissed, as no appeal lies from an order denying reargument *(see, Schumer v Levine,* 208 AD2d 605, 606).

SANTUCCI, J.P., ALTMAN, GOLDSTEIN and McGINLTY, jj., concur.

December 18, 2000

BEST v SEARS ROEBUCK & CO.

COPY #O-5

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

9272Q
Y/mm

WILLIAM C. THOMPSON, *J.P.*
WILLIAM D. FRIEDMANN
DANIEL F. LUCIANO
SANDRA J. FEUERSTEIN, 13.

1999-10398
Arthur Best, et al., appellants, v
Sears Roebuck & Co., et at, respondents;
Law Firm of Queller & Fisher, et S.,
nonparty respondents.

DECISION & ORDER ON MOTION

Motion by the nonparty respondents to dismiss an appeal from an order of the Supreme Court, Nassau County, dated August *5*, 1999, on the ground, *inter alto,* that no appeal lies from an order denying reargument, or, in the alternative, to enlarge the time to serve and file a brief.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branch of the motion which is to dismiss the appeal is held in abeyance, and is referred to the Justices hearing the appeal for determination upon the

argument or submission of the appeal; and it is further,

ORDERED that the branch of the motion which is to enlarge the time to file a brief is granted and the nonparty respondents' time to serve and file a brief is enlarged until August 24, 2000, and their brief must be served and filed on or before that date; and it is further,

ORDERED that no further enlargements of time shall be granted.

THOMPSON, J.P., FRIEDMANN, LUCIANO and FEUERSTEIN, 11., concur.

ENTER:

James Edward Pelzer
Clerk

July 24, 2000
BEST v SEARS ROEBUCK & CO.

COPY #O-6

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

9280Q
S/mm

DANIEL W. JOY, J.P.
WILLIAM D. FRIEDMANN
GAEPJ7EL M. KRAUSMAN
HOWARD MILLER, *31.*

1999-10393

Arthur Best, et al., appellants, v Law Firm of Queller and Fisher, et al., respondents.

DECISION & ORDER ON MOTION

On the court's own motion, it is

ORDERED that its decision and order dated May 10, 2000, in the above-entitled case is recalled and vacated, and the following decision and order is substituted therefor:

1999-10393, 1999-10398
DECISION & ORDER ON MOTION
Arthur Best, et al., appellants, v Law Firm of Queller and Fisher, et al, respondents (Action No 1).

Arthur Best, et aL, appellants, v Sears Roebuck, & Co., et al., defendants; Law Firm of Queller and Fisher, et al, nonparty-respondents (Action No. 2).

Motion by the appellants *pro se* to enlarge the time to perfect appeals from an order of the Supreme Court, Nassau County, dated October 14, 1999, entered in Action No. 1, and an order of the same court dated August 5,1999, entered in Action No. 2.

July 13, 2000

BEST v LAW FIRM OF QUELLER AND FISHER

Upon the papers filed in support of the motion and the

papers filed in opposition thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the appellants' time to perfect the appeals is enlarged and the appendices and briefs submitted to the Clerk of this court in connection with each appeal on May 26, 2000, have been accepted for filing.

JOY, J.P., FRIEDMANN, KRAUSMAN and H. MILLER, 11., concur.

ENTER:

James Edward Pelzer
Clerk

COPY #O-7

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present:

HON. BRUCE D. ALPERT Justice

TRIAL/LAS, PART 14
NASSAU COUNTY

ARTHUR BEST and DEBRA BEST,
INDEX No. 16195/99

Plaintiffs,

-against-

LAW FIRM OF QUELLER AND FISHER and FRED QUELLER, Individually, Jointly and Collectively,

Defendants.

MOTION SEQUENCE #s 1-2
MOTION DATE: September 16, 1999

The following papers read on these applications:

1. for summary judgment

2. for amendment relief

Notice of Motion	x
Notice of Cross-motion	x
Reply Papers	xx
Memorandum of Law	x

Upon the foregoing papers, it is ordered that this motion by defendants, the Law Firm of Queller and Fisher ("QF") and Fred Queller ("Queller"), made by Notice of Motion, dated August 12, 1999, for an Order granting summary judgment to the defendants dismissing plaintiffs' complaint, and plaintiffs' cross-motion, made by Notice of Cross-motion, dated September 1, 1999, for an Order permitting "plaintiff [singular] to amend its complaint" 1 [emphasis supplied], are both determined as set forth hereinbelow.

Plaintiff, Arthur Best, lost the use of his eye in 1993, when struck by a flexible rod from a tool chest he was using. Defendants QF and Queller represented the plaintiffs herein in their product liability action ("underlying action"). After years of litigation, plaintiffs accepted a total settlement offer of $1,750,000.00, *$1,575,000.00* for Mr. Best and $175,000.00 for the co-plaintiff with respect to her derivative claim.

As noted in this Court's March 24, 1999 Order in the underlying action (Index No. 2264/94), the defendants therein moved by Order to Show Cause, dated December 8, 1998, for an Order directing the manner in which the settlement proceeds should be distributed, and QF cross-moved for an order directing completion of the settlement. The Court received submissions from each of the movants in the underlying action, as well as from the Bests, and directed how the settlement should be effectuated.

Mr. Best's principal concern therein was that the settlement checks be mailed to him only, as he contended - wrongfrlly so, this Court found - that QIF had agreed to a different fee arrangement. Indeed, this Court noted therein that Mr. Best himself, had stated tat he had

1 Plfs' Notice of Cross-motion, dated 9/1/99.

made the request that settlement checks be sent directly to him, not as a consequence of asserted malpractice, but rather [b]because of an ongoing dispute for attorney fees, not revealed to the Court by prior attorney of record Queller."[2]

Thereafter, the plaintiffs, representing themselves, commenced the instant action. A summons was filed in the Nassau County Clerk's Office on June 18, 1999~, apparently with the conesponding complaint, a 16 page document. Among plaintiffs' claims are these:

(1) Mr. Best "was required to settle"[4];

(2) malpractice in that defendants failed to keep plaintiffs advised;

(3) breach of contact of representation;

(4) negligent misrepresentation;

(5) indemnification for defendants' negligence andlor breach Of contact for money plaintiffs did not receive in the underlying action;

(6) fraudulent misrepresentation and fraudulent concealment of material facts - the fee agreement - "Defendants pressured and coerced Plaintiff to settle their claim

creating a climate of fear

(7) punitive damages;

(8) interest;

In support of the motion-in-chief the defendants aptly posit that the Order of this Court dated March 24, 1999, in which the value of QF's services were established necessarily determined that there was no malpractice. They contend that plaintiffs' causes of action for fraud, breach of contact and indemnification are redundant of the malpractice cause of action 3/24/99 order, p. 8. *Defts'* ETh. "A". p. 2, ¶ 7. p. 1OA 41.

and, therefore, subject to dismissal. Lastly, it is argued that plaintiffs' cause of action for punitive damages is subject to dismissal because New York does not recognize a separate cause of action therefor. This Court agrees with each of the defendants' assertions.

Implicit in the determination which quantified the fee due

counsel in the underlying action, was that there was no malpractice. (see, Nat Kagan Meat & Poultry, Inc. v Kalter, 70 AD2d 632; John Grace & Co., Inc v Tunstead, Schechter & Tone, 186 AD2d 15 [1st Dept.])

Moreover, the Bests have not proffered evidence indicative of any acts or omissions constituting malpractice by QF or Queller, and their failure to present anything other than conclusory and vague allegations as to professional negligence, proximate causation and damages, in the face of the defendants' prima facie showing, is fatal to the claim.

Plaintiffs' causes of action for fraud, breach of contract and indemnification are, indeed, redundant of their malpractice cause of action. (see, Sage Realty Corporation v Proskauer Rose, LLP, 251 AD2d 35 [1st Dept.]; White of Lake George, Inc. v Bell, 251 AD2d 777, lv dsmd 92 NY2d 947)

Moreover, there is no separate cause of action for punitive damages recognized in this State. (see, Glatter v Chase Manhattan Bank, 239 AID2d 68, 73)

Plaintiffs' cross-motion is denied. (see, MorganvProspectPark Associates Holdings, LP 251 AD2d 306; McKiernan v McKiernan. 207 A]32d 825; see also, Branch v Abraham and Strauss Department Store, 220 AD2d 474)

Accordingly, defendants' application for summary judgment is granted, and the plaintiffs' complaint is dismissed.

This concludes all proceedings under index number 16 195/99.

DATED: October 14, 1999

_____

J.S.C.

COPY O-8

SHORT FORM ORDER

SUPREME-COURT – STATE OF NEW YORK

Present
HON. BRUCE D. ALPERT Justice

TRIAL/IAS, PART 14
NASSAU COUNTY
INDEX No. 22 69/94

ARTHUR BEST and DEBRA BEST,

Plaintiffs

-against-

SEARS ROEBUCK and CO., WATERLOO INDUSTRIES, INC. and AMERICAN BRANDS, INC.

Defendants.

MOTION SEQUENCE # 4
MOTION DATE: May 19, *1999*

The following papers read on this application

for reconsideration:	X
Notice of Motion	X

Upon the foregoing papers, it is hereby ordered that plaintiffs' application for reconsideration of the applications determined by Order of this Court dated March 24, 1999, is determined as hereinafter set forth:

The plaintiffs, who are proceeding without benefit of counsel, seek in this application to be freed from various directives contained in the Order from which they seek relief. In light of their status, the Court has construed the prayer for reconsideration broadly, so as to embrace both the concepts of renewal and reargument. -

At the outset the Court notes that contrary to the position advanced by● plaintiffs' former counsel, the instant application, having been served within thirty days of the service of the underlying order, has been timely made. (see, Siegel, Practice Commentaries, Mc *Kinney's* Cons- Laws of N?!., Book 718, C222 1:8)

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision (Foley v Roche, supra). The motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (see, Pahl Equip. Corp. v Kassis, 182 AD2d 22, lv denied, lv dismissed go NY2d 1005)." (Mater of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept [emphasis supplied)

As the applicants failed to demonstrate tat the Court misapprehended the facts presented or misapplied precedent in rendering its *prior* determination and have sought to reargue issues previously determined, leave to reargue is not available.

An application or motion to renew a prior motion is, like a motion to reargue, a vehicle for seeking a change in the prior result. The principal difference between renewal and

reargument is that the former presents new facts to the court, while the latter does not. (4 'Weinstein-Kern-MIller, N.Y. Civ. Prac., par. '~1.O3; see also, Siegel, Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book lB. C2221 :9)

Inasmuch as the instant application is not predicated upon the submission of new or additional evidentiary material, renewal may not be afforded.

Accordingly, the instant application is denied, and the directives contained in the March 24, 1999 Order continue in fill force and effect.

The prayer for relief contained in the opposing papers filed by plaintiffs former counsel is denied for procedural reasons. (see, CPLR 2215; Matter of Briger's Estate, 95 AD2d 887 (3d Dept.]; Siegel, Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book 78, C2215:l; cf., Fox Wander West

Neighborhood Association. Inc. v.... -. Luther Forest Community Association Inc.., 178 AD2d 871 [3d Dept.])

However, the Court is constrained to note that the record Thus to reveal any basis recognizable at law far the plaintiffs' refusal to execute the papers necessary to. bring closure to this seated matter. This continuing refusal to do so,in direct violation of a legal mandate, may not only expose the plaintiff to sanction under Part 130 of the Court Rules, but to the penalties which may be irnposed for contempt.

While the Court declines to afford counsel affirmative relief in the absence of an explicit notice of cross-motion, counsel is not without a remedy. Any such application shall be accompanied by a memorandum of law containing the relevant authority on which each contemplated remedy is predicated.

Dated August 5, 1999

COPY O-9

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present:

HON. BRUCE D. ALPERT Justice

TRIAL/IAS, PART 14
NASSAU COUNTY
INDEX No. *2269/94*

***ARTHUR* BEST and DEBRA BEST,**

Plaintiffs,

-against-

SEARS ROEBUCK and CO., WATERLOO INDUSTRIES, INC., MASTERBRANDS INDUSTRIES, INC. and AMERICAN BRANDS, INC.,

Defendants.

_The following papers read on these applications:

Order to Show Cause	**X**
Notice of Cross-Motion__	**X**
Supporting Affirmations___	**XXX**
Informal Submissions by the Plaintiffs	**XXX X**

Upon the foregoing papers, it is hereby ordered that the

motion by all the defendants in this action made by Order to

Show Cause, dated December 8, 1998, for an Order

(1) directing the defendants as to the manner of distribution of settlement monies, in accordance with a settlement agreement entered into in open Court on September 22, 1998;

(2) directing plaintiffs, Arthur Best and Debra Best, his wife, to enter into a confidentiality agreement as to the terms and conditions ofthe agreement; and

(3) staying all proceedings, including the entry of a judgment herein, pursuant to CPLR 5003-a, until a reasonable time has expired after the Court decides this motion;

and the cross-motion by the law firm of Queller & Fisher for

an Order

(4) directing the payment of money pursuant to the agreement by separate checks to the respective payees; and

(5) **directing the execution and delivery of appropriate documents within a specified time table, including general releases, confidentiality agreements, lien-reduction letters and stipulations of discontinuance;**

are both determined as set forth hereinbelow.

This matter is before the Court because of a fee dispute between the plaintiffs and their attorneys, a dispute which unfortunately has also drawn in the defendants, which are prepared to pay the sum provided in the settlement agreement. A review of a portion of the action's litigative history, together with the genesis of the underlying claims, will serve to place the applications at bar in proper perspective.

Plaintiff Arthur Best, was injured on or about April 17, 1993, when he was struck in the eye by a flexible rod from a tool chest he was using. As a consequence thereof, he lost the use of that organ.

After what appears to have been considerable research by him, Mr. Best, on September 9, 1993, contacted Queller & Fisher with an intention to explore retaining said firm in his proposed

action against the defendants. He had been referred to Queller & Fisher by the editor of Jury Verdict Reports, Russ Moran, who, aside from being a friend of Mr. Queller, represented to the plaintiff that counsel had obtained the then largest recovery in New York State for anyone with a comparable injury. ($1,500,000.00)

The Bests retained Queller & Fisher on October 11, 1993, in a telephone call. In that call, Mr. Best, speaking for himself and his wife, is asserted to have agreed to the usual retainer contingency fee payable to the firm. A *retainer* agreement was transmitted to the plaintiff on September 10, 1993, which set forth a one-third contingency fee. Counsel thereafter filed a Retainer Statement with the Office of Court Administration, showing thereon an entitlement to a one-third contingent fee, whether the matter was concluded by suit, settlement or

otherwise.

Counsel indicates that in November of 1994, after his firm had been representing the plaintiffs for over a year, he noticed, while preparing a legal document, that the retainer agreement had never been signed and returned. This omission was ultimately remedied when it was called to Mr. Best's attention.'

While Mr. Best suggests that he signed the retainer agreement in 1993, at his first meeting with counsel, there is no question but the standard Queller & Fisher, one-third contingent fee retainer agreement was executed albeit by Mr. Best, exclusively, and that he knew what he was signing. The executed retainer agreement is addressed to Queller & Fisher and contains preprinted language. Though it contains blank spaces, it is a one-third contingent fee retainer agreement, and provides tat the fee is to be computed based on

the net recovered from "suit, settlement or otherwise" after expenses, but before liens are deducted.

It is undisputed that the anger Mr. Best experienced and the frustration with his plight percolated throughout the term of the litigation and pervaded the attorney/client relationship. Indeed, Mr. Best confirmed this in his May 18, 1998 letter to counsel.

Nevertheless, counsel persevered and ultimately extracted an offer to settle the action for $1,750,000.00 ($1,575,000.00 in settlement of Mr. Best's cause of action and $175,000.00 in settlement of the derivative cause of action) which offer was accepted by the plaintiffs.

Not only were counsel's efforts instrumental in attaining a lucrative disposition of the third-party claim, but also in reducing, significantly, the corresponding Worker's

Compensation lien from $88,000.00 to $50,000.00.

In an exhibit, counsel indicates that the total disbursements are $13,209.88. However, the disbursements set forth on the Notice of Cross-motion amount to $11,889.00 In for Arthur and $1,390.00 for Debra, which two items total $13,279.00, not $13,209.88. a letter, dated November 20, 19982, Debra's expenses are listed at $1,320.00. Adding $11,889.00 and $1,320.00 yields an aggregated total of $13,209.00.

It would appear to be Queller & Fisher's contention, therefore, that it is entitled to the following fees:

Total Award to Arthur Best:	**$1,575,000**
Less: Disbursements of	**11.889**
	1,563,111
	x 33.3%
Attorney fees	**$520,516**
Award to Arthur Best After Fees & Disbursements	**1,042,595**
Less Worker's Compensation:	**$50,000**
Net Award to Arthur Best:	**$992,595**

Total Award to Debra Best:	**$175,000**
Less Disbursements of	**$1,320**
	$173,680
	X 33/3%
Attorney Fees	**$57,835**
Net Award to Debra Best After Fees & Disbursements:	**$115,845**

In its Notice of Cross-motion, dated December 11, 1998, Queller & Fisher indicates that the amount due to it is $521,037.00.

In its Notice ot Cross-motion, Queller & Fisher indicates that Mr. Best is entitled to $992,074.00.
1-/vu

A synopsis of the figures is set forth:

Arthur Best's Net Award	**$992,596**
Legal Fee	**$520,515**
Disbursements	**$11,889**
State Ins. Fund	**50,000**
Total Recovery	**$1,575,000**
Debra Best's Net Award	**115,845**
Legal Fee	**57,835**
Disbursements	**1,320**
Total Recovery	**175,000**

$115,845

After the settlement was accepted on September22, 1998, before the Hon. Albert Oppido, who was sitting as a Judicial Hearing Officer, plaintiffs corresponded with counsel. While the October 17, 1998 writing did not specifically discharge the firm, it clearly served to express their discontent.

Thereafter, on or about November 17, 1998, plaintiffs served Queller & Fisher with a document entitled "Entry of Appearance", which states:

"COMES NOW, Arthur Best and Debra Best pro se representing the Plaintiffs and makes this entry of appearance in the above titled case in any and all fi.iture pleadings of record."

The document is signed by both plaintiffs.

Although plaintiffs have submitted papers in opposition to both the

of the applications sub judice, plaintiffs' submissions have not been sworn in the presence of a notary and are, therefore, not in proper form. Irrespective of the defect in form, the Court has reviewed plaintiffs submissions in an attempt to distill therefrom the presence of a cognizable defense to the relief each applicant seeks. After such review, the Court concludes that applications at bar are meritorious, notwithstanding plaintiffs' protestations to the contrary, and should be granted.

In plaintiffs' document entitled "Response to Motion for Order to Show Cause", which is undated, but which both plaintiffs signed, they essentially take issue with the fact that their attorneys disregarded their "Entry ofAppearance", as a result of which defendants' counsel continued to communicate with Queller & Fisher. It appears to be the

plaintiffs' contention that defense counsel should deal directly with them and sen&them the settlement checks because the agreement indicated that documents were to be exchanged between attorneys. However, the plaintiffs are not attorneys, nor has a substitution of attorneys been effectuated.

In CPLR § 321(a), it is written, inter alia, that "[i]f a party appears by attorney such party may not act in person in the action except by consent of the court." No such consent has been sought by or afforded to either plaintiff.

"A litigant is at liberty to defend [or prosecute] the action himself- without recourse to an attorney. But if he appears by attorney, the client may not thereafter act in person except with the consent of the court [citation omitted]. The attorney having once been engaged and having appeared in the action, all subsequent proceedings must be conducted through him [citation omitted]. a notice of appearance on behalf of a litigant is not a professional retainer. It is a device adopted and utilized to facilitate the mechanics of litigation - and is a technique in that behalf not only for the benefit of the client, but for the

aid of the adversary and the judicial process as well. As such it is a protective cloak which cannot cavalierly be completely discarded - even by those who brought it into being -and this notwithstanding how *worn* the garment may have become or how unsightly the present *fit*. The cloth may now be ragged, but it is rugged enough nevertheless to protect others from unjust chills.

"A client genuinely desirous of discharging an attorney who had previously duly appeared for him is not without remedy, and neither is the court." (Cairn v Cain, 204 Misc. 1069, 1070, 1071, 1072)

Regardless of the foregoing, the entire matter, except the ministerial aspects thereof, was concluded as of September 22, 1998, when the agreement was made.

It is interesting to note that Mr. Best states:

"During the stipulated agreement hearing, the Court denied a request by Arthur Best, now pro se, to endorse the subject settlement checks to him personally. Plaintiff made the request because of an ongoing dispute for attorney fees, not revealed to the Court by prior attorney of record Queller. Plaintiff

I did not protest this denial only because there was no specific liens, fees or disbursements to Queller and Fisher named in the stipulated agreement."(paragraph 9 of "Response to Motion for Order to Show Cause)

It appears therefrom that Mr. Best seeks to avoid the payment of legal fees to Queller & Fisher for the extensive services rendered over the course of the protracted litigation. Moreover, Mr. Best does not dispute that he and his wife conferred privately with Judge Oppido and, apparently, made no mention to him of any fee dispute.

In a document submitted by plaintiffs entitled "Response to Motion by Queller and Fisher and Request for Sanctions", which is also undated and unsworn though signed by both plaintiffs, it is contended that Queller & Fisher has no right to apply for the relief herein sought since plaintiffs served their "Entry of Appearance" and proceed on a pro se basis. There is no merit to such contention. (see, Cairn v Cann, supra)

In a third document submitted by Plaintiffs, entitled "Affirmation in Support", also signed by both plaintiffs, but suffering from the same infirmity as previously indicated, plaintiffs make the argument that Mr. Queller initially said a recovery of $7,500,000.00 for Mr. Best's injury was "realistic". The statement ascribed to counsel is attenuated by the fact that Ms. Best had researched awards for similar injuries and had decided to retain his firm based on the attainment of the then largest award for such an injury in the history of New York State, a sum one-fifth of the figure asserted.

Notwithstanding plaintiffs disinclination to execute a standard one-third contingent retainer agreement in 1993, the record reflects that he did either then or a year later, and it was on tat basis that Queller & Fisher proceeded with

the case. Mr. Best cannot vary a written agreement, especially without evidence of impropriety. (see, 58 NY Jur2d, Evidence and Witnesses, §555) Still further, plaintiffs admit they consulted another attorney and had the opporWnity to properly terminate the attorney-client relationship, but elected not to do so. Ms. Best also admits that he was "never able to obtain a written retainer fee agreement with [Queller] based upon [Plaintiffs'] understanding" (paragraph 8 Affirmation in Support) of what the retainer should provide, which was, essentially, tat the plaintiffs were unwilling to pay a one-third fee, unless Queller & Fisher obtained a jury verdict of $7,500,000, and that Queller & Fisher would receive a proportionately smaller fee were less recovered.

As to the confidentiality agreement as part of the settlement, it is undisputed that while representing plaintiffs, Queller & Fisher agreed, apparently with plaintiffs' consent, that the litigants would sign a confidentiality agreement. Neither plaintiff denies this, under oath or otherwise. It must, therefore, be deemed a part of the comprehensive settlement.

By their cross-motion, Queller & Fisher suggest that separate checks be issued to all concerned, so that this action can be put to rest. The suggestion is well taken.

This Court directs as follows:

(1) Mr. Queller is directed to cause to be sent to the plaintiffs, both by certified mail, return receipt requested, and by regular mail, general releases running to the defendants, as well as stipulations of discontinuance, lien-

reduction letter, and the Confidential Settlement Agreements. The same shall be sent to Plaintiffs within fifteen (15) days of the date hereof;

(2) Within five(5) business days from the date on which the plaintiffs receive the aforesaid releases, stipulations, letters and Confidential Settlement Agreements, they are directed to execute the releases where indicated before a notary public, sign the stipulations of discontinuance, letter, and Confidential Settlement Agreements, andreturn all ofthem to Mr. Queller at Queller & Fisher, 110 Wall Street, New York, NY 10005, by certified mail, return receipt requested.

(3) Upon receipt of the executed releases, stipulations, letter and agreements, Mr.Queller is directed to transmit all said original documents to defendants' counsel forthwith,

and defendants' counsel, Bivona & Cohen, is directed to hold same in escrow until one week after it has sent the settlement checks as set forth hereinbelow.

(4) Within the period allotted by the CPLR after receipt of the aforesaid releases, stipulations, letter, and agreements all properly executed, defendants' counsel is directed to forward to the following parties checks in settlement of this action as follows:

(1) To Arthur Best:$992,595

(2) To Queller & Fisher (legal fee)$520,516

(3) To Queller & Fisher (disbursements)$11,889

(4) To Debra Best$115,845

(5) To Queller & Fisher (legal fee)$11,889

(6)To Queller & Fisher (disbursements)$1,320

(7)To State Insurance Fund $50,000

Total Settlement $1,750,000

(5) **The plaintiffs are hereby stayed from entering any judgment against any or all of the defendants in accordance with CPLR 5003-a until further Order of this Court is issued on application therefor on notice.**

(6) In the event any of the participants in this proceeding shall fail to comply with this Order, any other participant (and that includes Queller & Fisher) may apply for relief against the defaulting participant.

A copy of this Order shall be served by cross-moving counsel on the plaintiffs by first class mail and by certified mail, return receipt requested, and upon defense counsel pursuant to CPLR 2103 (b) (1, 2 or 3).

DATED: March 24, 1999

J.S.C

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ARTHUR BEST and DEBRA BEST,

Plaintiffs,

Index No.
Date
Filed w/Clerk
of Court

vs.

VERIFIED
COMPLAINT

LAW FIRM OF QUELLER AND FISHER
and FRED QUELLER, Individually,
Jointly and Collectively

Defendant(s)

Plaintiffs, ARTHUR BEST and DEBRA BEST pro se, complaining of the Defendants, set forth upon information and belief:

COMPLAINT FOR DAMAGES

COMES NOW Plaintiff pro se Arthur Best and Debra Best and files this

Complaint For Damages and for this cause states and allege;

GENERAL ALLEGATIONS

1. Plaintiff(s) are residents of Merrick, New York, County of Nassau, New York and thus claim venue in this Court.

2. Defendants are residents of the State of New York with law offices in the State of New York. Upon information and belief Defendants are licensed attorneys, licensed to practice law in the State of New York.

3. From a period commencing in October 1993 through November 16, 1998, the Defendants individually and jointly and in their corporate capacity, represented the Plaintiff personally under a verbal fee agreement.

4. There existed between the Plaintiff and the Defendants an attorney-client relationship through oral and implied agreement. The Plaintiff relied upon the advice of the Defendants to their detriment such that the Defendants are estopped from denying the existence of any attorney-client relationship.

5. After personal injury resulting

from a metal rod from a tool box striking him, Plaintiff Arthur Best lost his eyesight in one eye. Plaintiff Arthur Best and Debra Best, using the services of the Defendants, filed a personal injury Complaint against Sears Roebuck & Co., Waterloo Industries, Inc., Masterbrands Industries, Inc., and American Brands, Inc.. The $12,000,000.00 damage complaint was filed in the Supreme Court of the State of New York, County of Nassau under Index #2269/94 on January 27, 1994.

6. The Defendants individually and jointly represented the Plaintiff in the lawsuit.

7. Because of the deceitful, negligent and fraudulent acts of the Defendants in representing the Plaintiff and failing to properly advise the Plaintiff, the Plaintiff's case was never heard by a jury on the merits, as demanded by the Plaintiff. Plaintiff was required to settle the above referenced lawsuit in the amount of $1,750,000.00 when a substantially higher award was sought through a jury trial and promised by the Defendant.

8. The Plaintiff was never furnished a completed and conformed written retainer agreement based upon

Plaintiff demand for a jury trial.

9. The Plaintiff in this cause of action allege they were extorted financially and duped through deceit, collusion and fraud, and because of the negligent acts of the Defendants, Plaintiff on September 22, 1998 was forced to settle his own lawsuit without the assistance of the Defendants. The Plaintiff was damaged by the negligent acts of the Defendants, as will be more specifically set forth hereinafter.

COUNT I

CLAIM FOR LEGAL MALPRACTICE

10. The Plaintiff incorporates by reference each and every allegation previously plead herein as though the same were specifically set forth in this Count.

11. At all times material hereto there existed between Plaintiff and the Defendants an attorney-client relationship, either implied-in-law, implied-in-fact, or by oral agreement, or by estoppel such that the Defendants owed to the Plaintiff the duty to provide the Plaintiff with proper, professional and appropriate legal advice.

12. At all times material hereto the

Defendants breached the duty owed to the Plaintiff in at least the following particulars:

a. The Defendant failed to advise Plaintiff fully and completely on the terms of their attorney/client relationship, leaving false impressions and understanding by the Plaintiff. Upon information and belief this nondisclosure and concealment was wilful and wanton in an effort to confuse Plaintiff concerning the Defendants professional obligations and responsibilities owed to the Plaintiff.

b. The Defendant failed to advise Plaintiff of numerous alleged acts of ongoing investigation, case preparation or other like "costs" incurred by the Defendants or third parties and other "costs" to be deducted from proposed disbursement of settlement to Plaintiff.

c. The Defendant has refused to furnish Plaintiff with any third party documentation regarding "costs" from Defendants from the proposed settlement disbursement to Plaintiff.

d. The Defendant failed to provide details and information about their behind the scenes negotiations with

adversary lawyers and the defendants in the underlying case.

e. The Defendant failed to provide adequate and appropriate advice to Plaintiff prior to and during the settlement negotiations.

f. The Defendant was negligent in each and every act performed, and in the advice given or failed to be given to the Plaintiff under the facts of the underlying case.

g. The Defendant failed to provide the Plaintiff with appropriate and professional legal advice under all of the facts and circumstances as they existed during the handling and negotiation of the underlying case.

13. The acts of the Defendant constituted negligence as that term is defined in law. The negligence of the Defendant was the sole and proximate cause of injury to the Plaintiff in this cause.

14. Because of the aforementioned acts of the Defendant the Plaintiff has been damaged in an amount subject to proof before a fully informed jury trial.

15. The acts of the Defendant were the cause in fact of damages to Plaintiff.

COUNT II
BREACH OF CONTRACT

16. The Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1 through 15 as though the same were specifically plead herein.

17. At all times material hereto there existed between the Plaintiff and Defendant an actual contract or an implied-in-law or quasi contract wherein the Defendant undertook to provide legal services to the Plaintiff.

18. The Plaintiff relied upon the fact that the Defendant was their lawyer through out the transactions which are involved in this litigation to their detriment such that the Defendant is estopped from denying the existence of any attorney-client relationship.

19. There existed an implied contract to provide legal services between the Plaintiff and the Defendant in this case.

20. The Defendant breached the

contract with the Plaintiff, such that the Plaintiff is entitled to damages for Breach of Contract in an amount to be proven at a trial by jury.

21. The acts of the Defendant were the cause in fact of the damages to the Plaintiff.

COUNT III
NEGLIGENT MISREPRESENTATION

22. The Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1 through 21 as though the same were specifically plead herein.

23. The Defendant owed to the Plaintiff the professional duty to keep the Plaintiff totally advised and informed as to all aspects of various negotiations and relationships with Defendants and adversary lawyers in the case. This was not done.

24. The Defendant breached their professional duty owed the Plaintiff to keep the Plaintiff properly and adequately informed of all such representations and all facts and consequences of their legal advice and/or their failure to give legal advice to the Plaintiff in the case.

25. The Defendant also owed to the Plaintiff the duty to disclose to the Plaintiff and fully inform the Plaintiff of each and every potential risk in the case which existed and would effect settlement of the case, as the lawyer serving as legal advisor to the Plaintiff.

26. The Defendant breached these duties owed the Plaintiff, such that Defendant acts constituted negligent misrepresentation as that term is defined by law.

27. The Defendant's negligent misrepresentations to the Plaintiff were a contributing cause or the sole and proximate cause of injuries and damages to the Plaintiff in an amount subject to proof at a jury trial.

28. The acts of Defendant were the cause in fact of sizeable money and emotional damages to the Plaintiff.

COUNT IV
INDEMNIFICATION

29. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1 through 28 as though the same were specifically plead herein.

30. As previously plead herein the acts of the Defendant constitutes Negligence and/or Breach of Contract for which the Plaintiff is entitled to be indemnified by the Defendant for the actual damages Plaintiff suffered as a direct result of following the wrongful advice of the Defendant, through non-disclosure and concealment of material facts and/or due to the Defendant's failure to properly and professionally advise the Plaintiff.

31. The Plaintiff is therefore entitled to indemnification for any money Plaintiff failed to receive and money Plaintiff may be required to pay in Cause #2269/94 in the Supreme Court of the State of New York, which were due to the Negligence of the Defendant or the Defendant's Breach of Contract and for all sums liened by Defendant against proposed settlement disbursement funds in the cause of action. And for damages caused from delay in receiving any and all settlement monies due the Plaintiff and accrued interest thereon.

32. The acts of the Defendant were the cause in fact of the enumerated damages to the Plaintiff.

COUNT V

FRAUDULENT MISREPRESENTATION

AND
FRAUDULENT CONCEALMENT OF MATERIAL FACTS

33. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1 through 32 as though the same were specifically plead herein.

34. Plaintiff Arthur Best first contacted Fred Queller of Queller and Fisher by telephone in September 1993. Subsequently a meeting was had between Fred Queller and Plaintiff Arthur Best in late September 1993 to discuss the personal injury case. After details of the injury were discussed, it was determined in that meeting by Fred Queller that a lawsuit for $7,500,000.00 was realistic. Next the focus turned to the subject of a fee agreement. Plaintiff explained he was not willing to enter into a standard 33 1/3% unless Plaintiff prevailed for the full amount at a jury trial. An agreement was reached that the terms of a fee agreement would be 33 1/3% only if the full amount of the lawsuit was awarded in a jury trial. Using $7,500,000.00 as equals 100% or 33 1/3% fee, the fee would be reduced proportionally downward as the award is reduced. An example would be if an award of $3,750,000.00 was achieved then the

lawyer fee would be 16.65%, etc.. There was never a discussion of a settlement in the case. Fred Queller ask Plaintiff to sign a blank retainer form with the promise that it would be discarded if his firm was not hired. He stated if his firm was hired, he would then detail the fee terms discussed, complete and sign the form and send Plaintiff a conformed copy.

35. Approximately one month after the first meeting between Plaintiff and Defendant, in October 1993, Plaintiff Arthur Best called Fred Queller and told him he would employ the services of the Queller & Fisher firm with Fred Queller handling the case, based upon their prior discussion and fee arrangement. The Queller firm then decided the lawsuit would be filed for a larger amount and the firm filed the personal injury lawsuit for $12,000,000.00 in January 1994.

36. After some period of time no conformed fee agreement was forthcoming and Plaintiff Arthur Best requested same. Plaintiff was again promised a conformed copy of the agreement.

37. Again in November 1994,Plaintiff Arthur Best telephoned Fred Queller to request a copy of the fee agreement. To

Plaintiff's surprise, Plaintiff received a copy of the blank form originally signed by Plaintiff in his first meeting with Fred Queller.

38. With no disclosure to Plaintiff Arthur Best and in total concealment, and without a signed agreement of terms and understanding by all the parties, Defendants Queller & Fisher proceeded to file a retainer statement of record on October 30,1993 in the Court. No conformed copy was ever furnished to Plaintiff Arthur Best nor was a notice ever given to Plaintiff that such a retainer statement was even required and filed of record.

39. Regardless of promises of Defendants, Plaintiff was never able to obtain a written retainer fee agreement with Fred Queller based upon their

understanding of fees and terms discussed and agreed upon in their first meeting in September 1993. Plaintiff Debra Best likewise was never furnished a retainer fee agreement.

40. Defendants told Plaintiff their original claim of $7,500,000.00 was worth more and filed the $12,000,000.00 lawsuit on Plaintiff's behalf. In May 1998, Defendants refused to even discuss the

amount of the claim in a pretrial conference with a judge. The defendants stated there was no purpose in discussing such a proposed amount. (Acknowledged by Fred Queller in an Affirmation filed with the New York Supreme Court on December 11, 1998).

41. Defendants pressured and coerced Plaintiff to settle their claim-creating a climate of fear with statements that Plaintiff could not expect a larger settlement or award-making repeated representations to Plaintiff's that their Jewish religion, financial status and geographical location of Plaintiff's home would preclude a larger settlement.

42. Plaintiff alleges over twenty additional false and misleading representations were made in a December 11, 1998 Affirmation filed in the New York State Supreme Court, County of Nassau, by Defendant Fred Queller in an attempt to gain a 33 1/3% fee on a $1,750,000.00 settlement to Plaintiff. This document will be presented in a trial on merits.

43. Plaintiff has not only been damaged through fraudulent misrepresentation but also through fraud and actionable deceit by the Defendants as a proximate result of fraudulent

concealment and nondisclosure of facts material to litigation of the lawsuit and facts material to the settlement of the underlying lawsuit.

44. The Defendants suppressed vital information and material facts in failing to disclose the following to Plaintiff;

a. In a vital psychological examination of Plaintiff,the Defendants did not appear-stating their appearance was not necessary.

b. An important Engineer's resume, report and video tapes was concealed from the Plaintiff.

c. Plaintiff discovered Professor Tsakalakos submitted an eighteen page report, vital to the case. This material was not disclosed to Plaintiff.

d. Defendants abandoned the issue of liability in the case based upon Professor Tsakalakos findings. This material fact was totally concealed from Plaintiff.

e. Defendants presented a claim for $13,209.88 for "costs" repeatedly refusing to furnish Plaintiff with an itemization for this claim.

f. Defendants initiated a settlement conference with adversary lawyers and their clients failing to disclose to Plaintiff the material facts of negotiation.

g. Defendants at some point in the case decided to exclude economic damages from the personal injury claim and concealed this vital fact from the Plaintiff.

h. Defendants permitted psychiatric examination and deposition of the Plaintiff without representation by the Defendants-stating their appearance was not necessary.

i. Defendants did not disclose and totally concealed negotiations by Defendants with Workers Compensation accepting a settlement without laintiff's consent or knowledge. Plaintiff has been contacted recently by this agency demanding a settlement which is totally different from stated amounts given by the Defendant in a settlement conference.

45. Defendants took advantage of Plaintiff Arthur Best who had suffered the loss of one eye. Defendants recognized the vulnerability of their client whose lifestyle had been disrupted, personally, physically, professionally, emotionally and

psychologically.

46. Defendants actions were designed to create a climate of further confusion and fear for Plaintiff, using their professional knowledge of such situations to ultimately avoid a jury trial and coerce Plaintiff into a settlement lucrative only to the Defendants.

47. If the Defendants had disclosed all the material facts regarding their motive for cessation of court litigation of the case and their motive to extort and coerce the Plaintiff to settle almost at any price at the hands of their own lawyers, Plaintiff would have never submitted to settlement negotiations and become the now legal victim of this personal injury.

48. All of the Defendants had a fiduciary duty, a statutory obligation

and a moral and ethical duty to disclose these material facts. Instead the Defendants chose to conceal vital facts from the Plaintiff which was the proximate cause of injury to the Plaintiffs. These Defendants had a particular knowledge which was highly significant and relevant to the settlement of their lawsuit, which facts Defendants never advised or shared with

the Plaintiffs.

49. The Defendants knew Plaintiff did not know about these facts, but which in fairness and justice, Defendants knew they should reveal all material facts entirely to the Plaintiffs but chose concealment instead.

50. These nondisclosed facts of substance and deceit of suppression directly affected Plaintiffs lawsuit and settlement of the lawsuit for only slightly more than fourteen percent of the total amount represented by the Defendants that Plaintiff should receive.

51. The Defendants were aware of the materiality of the suppressed facts and also knew that the Plaintiff was ignorant of these facts. This represents actionable fraud where these Defendants knew these facts would materially affect the desirability of settlement of the lawsuit.

52. Defendants knew that Plaintiff would not proceed with the settlement if Plaintiff had been apprised of the nondisclosed facts and knew further that Plaintiff was unaware of these facts.

53. These facts clearly show intent by the Defendants to induce action by the

Plaintiff to engage in settlement negotiations for a quick settlement that even though detrimental to Plaintiff would result in a big fraudulently claimed fee of approaching $600,000.00. This amount for relatively little time involvement and effort during the five year pending of the case which ultimately ended as a forced settlement by the Plaintiff without the presence of the Defendants.

54. Plaintiff was justifiably induced and forced to act by reason of the nondisclosed and suppressed facts by the Defendants. The Defendants knew the Plaintiff was not competent to make determinations or to ask questions about the suppressed facts which Defendants knew should be disclosed but chose not to disclose.

55. As a proximate cause of Defendants fraudulent representations and fraud through suppression of facts and nondisclosure of facts in the lawsuit, Plaintiff suffered damage amounting to over eighty five percent of a lawsuit amount originally determined as realistic by the Defendants.

56. The acts of Defendants were the cause in fact of damages to Plaintiff through non-disclosure of these facts.

COUNT VII
PUNITIVE DAMAGES

57. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1 through 56 as though the same were specifically plead herein.

58. Plaintiff's Arthur Best and Debra Best not only have to live with the mental anguish and emotional trauma of the wrongful and untimely personal injury in the total loss of a body part which was the subject of the underlying lawsuit but now another cruel dimension is added to their grief.

59. With this background, the acts of the Defendants constituted such wilful, wanton gross negligence and fraud both in the manner in which Defendant brought fraud upon the Plaintiff and breached the contract with Plaintiff such that the Plaintiff is entitled to punitive damages against the Defendant in an amount subject to proof at a trial by jury.

INTEREST

60. Plaintiff is entitled to pre-judgement interest from September 22, 1998, the date the Plaintiff entered into

a settlement agreement in the underlying cause for which Defendant is the proximate cause of no settlement monies disbursed to Plaintiff. Plaintiff is also entitled to post-judgement interest on all damages recovered in this lawsuit. Plaintiff prays for an award of pre-judgement and post-judgement interest to compensate Plaintiff for their loss to be determined by Jury or at the statutory rate.

JURY DEMAND AND PRAYER FOR RELIEF

61. WHEREFORE, all the causes considered, Plaintiff's and jointly, pray for the amount of at least $5,750,000.00 in this cause, plus pre-judgement and post-judgement interest and punitive damages and for Court costs and attorney fees from these defendants, individually, jointly and severally. And for such other and further relief which a jury may

determine is legal and equitable. Plaintiff hereby makes a JURY DEMAND of twelve jurors for final determination of the claims in this lawsuit.

PROPRIA PERSONA PLEADING

62. Pleadings in this case are being filed by Plaintiff In Propria Persona, wherein pleadings are to be considered

without regard to technicalities. Propria, pleadings are not to be held to the same high standards of perfection as practicing lawyers. See Haines v. Kerner 92 SCt 594, also See Power 914 F2d 1459 (11th Cir1990), also See Hulsey v. Owens 63 F3d 354 (5th Cir 1995).

Respectfully submitted

_____

Arthur Best

_____

Debra Best
pro se for Plaintiff
70 N. Main Street
Freeport, N.Y., 11520
Tel: 516-378-2600

COPY
ARGUMENT
NOT REQUESTED

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-- SECOND DEPARTMENT

ARTHUR BEST and DEBRA BEST

Plaintiff-Appellant

vs. Case No.**1999-10393**

LAW FIRM OF QUELLER AND FISHER
and FRED QUELLER, Individually,
Jointly and Collectively

Defendant-Respondent

1. This appeal addresses the continuous due process violations of Appellant in the Court of questionable jurisdiction. This Court is asked to take notice that all judicial laws and rules are subordinated to the clear reading of the U.S. Constitution, which Constitution all judicial officers have sworn to uphold under Title 28, Sec. 453. The Courts cannot go behind the Constitution and by any original

standard judge the justice or legality of any single one or more of the provisions therein. The judiciary is but the creature of the Constitution and it cannot judge it's creator. See: Ex parte Newman, 9 Cal 502 & Ex parte Andrews 18 Cal 678. There is an abundance of case law on the subject of interpolation and additions to the U.S. Constitution. See: United States v. Sprague, 282 US 715, 51 S. CT 220 and Sandelin v. Collins, 1 Cal2d 147 and Ervin v. Collins 85 So 2d 852 and Platte Valley Public Power & Irrig. Dist. v. Lincoln County, 144 Neb 584.

2. The attempt at denial of standing and status to Appellant as a non-lawyer pro se litigant in an underlying action presided over by this judge was carried over into the instant case where clearly there was a continued subtle denial of pro se non-lawyer self-representation for Appellant upon his filing of the Complaint.

3. This type of activity by a judge denies a clear reading of the U.S. Constitution Amendment IX and X and XIV Section I. This denial subordinates the U.S. Constitution to judicial laws and rules and thereby denies Appellant of his constitutional rights through the use of the lawyer "rules mentality". See 17 U.S. Statute At-Large 13, an act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes;

4. "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person who, under color of law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person within the United States to the deprivation of any rights, privileges, or

immunities secured by the Constitution of the United States, shall any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.....under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases." (17 Statute At-Large 13)

5. The judicial order being appealed in this case (re: page 4 of the Order) actually employs the use of judicial (case law) and judicial rules practice to overcome the clear reading of the U.S. Constitution and deny the civil and constitutional rights of Appellant.

ISSUE NO. 2: QUESTION OF JUDGE ALPERT'S APPEARANCE OF IMPARTIALITY, HIS RULING IN A PRIOR CASE WITH THE SAME PARTIES AND FAILURE TO DISQUALIFY HIMSELF IN THE INSTANT CASE.

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6. Judge Alpert knowing non-lawyer pro se Appellant Best was contemplating the filing of a legal malpractice against the lawyer in the underlying action made an unprecedented move to "lock the door" to a legal malpractice lawsuit in an arbitrary ruling which denied Appellant due process and then proceeded to preside over the separate litigation claim in a legal malpractice lawsuit. (Re: Appeal #1999-10398 in this Court).

7. United Citizens For Legal Reform, a national

organization who processes complaints by non-lawyer pro se litigants has stated; "It is no secret and is the testimony of thousands of non-lawyer pro se litigants nationwide that their largest obstacle to overcome in a court room is not the issues of litigation but the bias and prejudice shown by judges toward non-lawyer pro se litigants vs lawyer representation."

8. The correct standard under section 455 is a bias-in-fact standard or an appearance of bias approach. It is the judge's duty to refuse to sit where he is disqualified. The ABA Code of Judicial Conduct, Canon 3(C) provides in relevant part; "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where; (a) he has a personal bias or prejudice concerning a party, or has personal knowledge of disputed evidentiary facts concerning the proceeding.

9. This judge showed his bias and prejudice toward the Appellant's non-lawyer pro se status upon his entry of appearance vs the adversary lawyer representation in an underlying personal injury case. That bias continued up to and including the issuance of the Order being appealed. The contents of the Order reflects the bias and prejudice toward the Appellant, even including the judge's "statement of facts" which are not factual, in re; pages 3 & 4 of the Court Order dated October 14, 1999.

10. The judge continues to deny Appellant's constitutional due process rights through the use of "court rules and judicial discretion" (re: page 4 of the Court Order) somehow as a greater justifiable authority than the U.S. Constitution which Constitution this judge took an oath to defend. See Title 28 Section 453.

11. The core of this issue is the bias-in-fact standard of approach and the appearance of bias and prejudice by this judge. For no other reason than this judge's ruling in an underlying case which he knew would be the direct basis of his Order in this case, this judge had the responsibility of disqualifying himself under Title 28 U.S.C.A 455(a).

ISSUE NO. 3: GRANTING OF A SUMMARY JUDGEMENT BY THE COURT WAS PREJUDICIAL AND TOTALLY VIOLATED THE RULES GOVERNING DISMISSAL ON SUMMARY JUDGEMENT.

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12. The granting of summary judgement in this case was tied to a ruling made by the same judge in an underlying case which questions jurisdiction of the issues, disqualification of the judge and denial of Appellant's Constitutional rights. That case is being appealed in this Court as stated above in argument of issue #2. Under any other circumstances of litigation the rules and laws of summary judgement would have prevented the granting of summary judgement. Argument against summary judgement in this case is well documented and should not have been granted under the doctrine of res judicata or collateral estoppel.

13. The Defendants filed a motion for summary judgement based upon the doctrine of res judicata and collateral estoppel. These doctrines do not apply in the instant cause and the argument is given below. Apparently relying upon the aforementioned doctrines, defendants failed to address the genuine issues of material fact which preclude summary judgement.

14. The primary function and duty of the court in passing upon a motion for summary judgement is to determine whether there is issue of fact to be tried. See Falk v. Goodman, 7 NY2d 87, 195 NYS2d 645, 163 NE2d 871. The province of the court on such a motion is not to try issues of fact but rather to determine whether such issues exists. See Barr v. County of Albany (1980) 50 NY2d 247, 428 NYS2d 665, 406 NE2d 481 also See Manchester Memorial Hospital v. Whitney, 6 Conn Cir 212, 269 A2d 300, pet denied 158 Conn 667, 259 A2d 648. If there are issues of fact, the motion for summary judgement is denied. See Smith v. United States (CA9 Ariz) 362 F2d 366, 2 ALR Fed 1021. A summary judgement should never be granted unless the facts are clear and undisputed See Fisher v. Sun Underwriters Ins. Co. 55 RI 175, 179 A 702, 103 ALR 1097.

15. The material facts and issues remaining as outlined in Appellant's Complaint should be tried on merit and preclude summary judgement;

1. Negligence:

Plaintiff has alleged negligence under their legal malpractice cause and negligent misrepresentation under a separate cause of action. The issue of negligence, including contributory negligence, are not ordinarily susceptible of summary adjudication for the reason that even though there may be no dispute about how a personal injury occurred, the presence or absence of negligence often remains a question of fact which requires a trial under traditional principles of the law of negligence. Newly discovered evidence and testimony to be offered in this cause of action by an expert witness showing gross negligence by the Defendants, which in effect denied Plaintiff over $2 million dollars in economic benefits..

See Blixton v. MacNary, 23 App. Div 2d 573, 256 NYS2d 362, also See Petros v. Kellas, 146 W. Va 619, 122 SE2d 177, also Levine v. Behn 282 NY 120, 25 NE2d 871, also See Pacesetter Communications Corp. v. Solin & Breindel, P.C., 150 A.D.2d 232, 233, 542 N.Y.S.2d 404 (1989).

2. Legal Malpractice:

Numerous genuine issues of material fact remain under this cause of action. These acts do not just include the acts of commission but the serious acts of omission. An expert witness stands ready to testify that these acts of omission in representation denied the Plaintiff a potential additional award of over $2 million dollars in economic benefits in a previously highly successful business now all but lost because of the personal injury of the owner. A motion for summary judgement may be denied where there is a possibility that important facts not appearing from the papers may be developed upon trial. See International & Industrial Secur. Corp. v. Jamaica Jewish Center, Inc. 237 App Div 738, 263 NYS 840.

3. Contract Construction and Breach of Contract:

This is a genuine issue of material fact that can only be resolved on parol evidence and is a triable issue. The dispute on the construction of an ambiguous contract according to the intention of the parties is a question that cannot be decided on affidavits under summary judgement procedure. See Borrelli v. J.H. Taylor Const. Co. (Sup) 37 NYS2d 150 also See Russell v. Lopez (City Ct) 16 NYS2d 595, affd 259 App Div 885, 20 NYS2d 1016.

4. Fraudulent Misrepresentation & Concealment:

This is a genuine issue of material fact and is a triable issue. A summary judgement is particularly inappropriate where the inferences that the parties seek to have drawn deal with motive, intent, consciousness, conscience and subjective feelings and reactions. See Cross v. United States (CA2 NY) 336 F2d 431

5. Intentional Infliction Of Emotional Distress:

This is a genuine issue of material fact and a triable issue. The complaint is laced with facts which support this cause of action as finally set out in paragraphs 58 and 59 of Plaintiff's complaint. This issue deals with motive and intent. See Alabama G&R Co. v. Louisville & N&R Co. (CA5 Ala) 224 F2d 1, 50 ALR2d 1302.

16. On motion for summary judgement the burden is on the moving party to establish that there is no genuine issue of fact and all reasonable doubts are resolved. Defendants have failed this test. See Parmelee v. Chicago Eye Shield Co. (CA8 Mo) 157 F2d 582, 168, ALR 1130.

17. Summary judgement is not applicable to doctrines of res judicata and collateral estoppel;

1. The Defendants requested a summary judgement on this cause claiming a defense under the doctrine of Res Judicata and Collateral Estoppel.

2. The essence of the defense of Res Judicata is that the same parties may not litigate a second cause of

action based upon a previous cause of action settled on merits. That is not the facts in the instant cause.

3. Collateral estoppel is a specialized aspect of the doctrine of res judicata. Collateral estoppel does not invoke merger and bar of causes of action.

4. The instant cause of action relates only to a previous cause of action because of legal representation of the Plaintiff by the Defendants in that action.

5. The instant cause raises multiple causes of action which have not been previously litigated. Only one of the issues in the instant cause of action relate in any way to the settlement in the underlying cause, which issue is the fee dispute with the Defendants. In the settlement conference in the underlying action there is no record of the actual fees claimed by the Defendants-only that a fee was owed the Defendants. All other issues raised in this cause of action have not been previously litigated. In fact the fee dispute has not been previously litigated as required by the assertion of res judicata and collateral estoppel. Plaintiff has previously raised the legal issue that this Court had no jurisdiction on that non-litigated issue and the issue therefore could not have been resolved. There never existed a "legal" retention agreement between the parties which held that the Defendants were entitled to a 1/3 fee. Newly discovered evidence presented in the instant cause could not have been presented in the underlying cause even on this issue.

18. There are three essential requirements for res judicata;

1. Were the issues in the instant cause of

action identical in a prior cause of action and those issues decided in a prior adjudication?

2. Was there a final judgement on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

19. These questions cannot all be answered affirmatively and therefore res judicata cannot be found to bar this cause of action.

20. The defense of res judicata provides no assistance to the defendant unless the judgement sought to be given res judicata effect was entered in a prior action satisfying a number of specific requirements.

1. The jurisdiction of the court over both subject matter and parties. Only one issue in this complaint has any relevancy to the underlying action and that is the fee dispute. In this case a judgement was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgement should have opportunity belatedly to attack the court's subject matter jurisdiction and a full and fair hearing. Plaintiff was not given that opportunity. See Continental Casualty Co. v. Rapid-American Corp., 80 NY2d 640, 593 NYS2d 966, 609 NE2d 506, also See Restatement (2d) of Judgements #12; Boskey & Braucher, Jurisdiction and Collateral Attack, 40 Colum.L.Rev. 1006 (1940); Dobbs, The Validation of Void Judgements, 53 Va.L.Rev. 1003, 1241 (1967); Note, Filling the Void: Judicial Power and

Jurisdictional Attacks on Judgements, 87 Yale L.J. 164 (1977).

21. Appellant was never been given opportunity belatedly to attack the court's subject matter jurisdiction on the fee dispute. Court pleadings will show, without question, Appellant did not get a full and fair opportunity to litigate this issue in a prior proceeding leaving the application of collateral estoppel unfair to the Appellant. In addition to the full and fair opportunity litigation theory, Plaintiff demonstrated newly discovered evidence in the instant cause, which evidence, is essential to a proper decision on the issue in the prior action and that he was not responsible for that evidence not being before the court in the prior proceeding. See McLellan v. Columbus I-70 West Auto Truckstop, Inc. (NDIll) 525 F Supp 1233.

22. Appellant alleges that the additional evidence shown in pleadings of the instant cause was crucial to a proper resolution in the underlying action and that he bore no responsibility for the absence of the testimony or evidence in the prior action. Nor was Appellant ever given a full and fair opportunity to raise any facts on the issue in the settlement hearing. See Fred Olson Motor Service v. Container Corp. of America (1st Dist) 81 Ill App 3d 825, 37 Ill Dec 5, 401 NE2d 1098.

23. Appellant alleges, for res judicata and collateral estoppel to preclude litigation of an issue, there must have been available some avenue of review and opportunity to litigate the issue of the prior ruling. See Cockrell v. Republic Mortg. Ins. Co. (Tex App Dallas) 817 SW2d 106 also Conley v. Spillers, 171 W. Va 584, 301 SE2d 216, also Slide-a-Ride of Las Cruces, Inc. v. Citizens Bank of Las Cruces, 105 N.M.

433, 733 P.2d 1316 (1987).

24. . The finality of the decision must apply. Res judicata has no application unless the decision sought to be applied as res judicata is final. A party must receive a fair opportunity for a judicial determination consistent with due process. See French v. Rishell, 40 Cal.2d 477, 481, 254 P.2d 26, 28 (1953). There is no finality of decision on the instant cause of legal malpractice and other related issues. The doctrine of res judicata will be applied only to a decision on the merits. Written opinions of the court, minute orders and denials without opinion of interlocutory writs are not judgements with the finality necessary to the application of res judicata. There was no legally qualified finality of decision even on the issue of fee dispute necessary to the application of res judicata. See People v. Schmidt, 83 Cal.App.3d 968, 973, 148 Cal.Rptr. 426, 428 (1978).

24.. The identity of the causes of action encompassed within the judgement and presented by the subsequent action is questioned. Res judicata is a complete bar only when the second action is on the same cause of action. The instant cause of legal malpractice is not the same as the underlying cause of action and there are no identical issues.

25. Under the primary rights theory legal malpractice is an appropriate cause of action. Plaintiff has the primary right to be free from economic injury caused by an unlawful conspiracy, negligence, legal malpractice, breach of contract, etc., as alleged in the instant cause. The cause of action is founded in the harm suffered, not the particular theory asserted.

26. The issues raised in the instant cause could not

have been raised in the first litigation. None of the issues raised in the instant cause could have been raised in the first litigation. In fact the Defendants were not parties to the first litigation.

27. Defendants claim of bar for this cause of action under res judicata is a total legal misnomer. Res judicata addresses only a bar to litigation of the same cause of action previously litigated. The cause of legal malpractice and the related causes in this complaint have not been previously litigated. There is no single mention of a legal malpractice cause of action in all the pleadings of record in the underlying cause. There is no final valid judgement on the cause of legal malpractice which would be a requirement under Defendants claim of res judicata. There has been no fair adversary hearing on any issue raised in this cause of action, a requirement of due process.

28. On the doctrine of collateral estoppel, collateral estoppel does not invoke merger and bar of causes of action. Collateral estoppel addresses only issues actually litigated on the merits.

29. The defense of collateral estoppel cannot be asserted unless the judgement alleged to collaterally estop the adverse party fulfills the majority of identical requirements essential in the application of res judicata.

30. There was no judgement rendered on the issues of legal malpractice and related issues which constitute the instant cause of action.

31. The issue(s) to be foreclosed by collateral estoppel must have been actually litigated and necessarily decided in

the prior action. See American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 218, 246 P.2d 935, 939 (1952).

32. The sufficiency of pleading theory does not qualify. A plea of res judicata is insufficient if it is only suggested or hinted at. See Leahy v. Local 1526, American Federation of State, etc., 399 Mass 341, 504 NE2d 602, 136 BNA LRRM 2805. The general rule applies that the pleading must allege all the facts necessary to make the defense complete. See Fabrizio v. U.S. Suzuki Motor Corp., 362 Mass 873, 289 NE2d 897. A mere reference to a prior proceeding on a single issue of a multiple cause of action complaint is inadequate in the application of res judicata or collateral estoppel. See McLean v. McLean (Fla App D2) 461 So 2d 1031, 10 FLW 171. Defendants have lumped Appellant's causes of action and have failed to plead with any specificity where all the causes of action are applicable to the doctrine of res judicata and collateral estoppel. In following this procedure, Defendants have not addressed the genuine issues of triable fact which precludes summary judgement. Defendants Motion does not meet the sufficiency of pleading test for summary judgement.

ISSUE NO. 4: APPELLANT OFFERED SPECIFIC PRIMA FACIA EXAMPLES TO SUPPORT OTHER CAUSES IN THEIR LAWSUIT, WITH JUDGE DISMISSING THOSE CAUSES IN AN OBVIOUS PREJUDICIAL DECISION.

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33. The judge's cavalier dismissal of other causes in Appellant's Complaint as "redundant" was another denial of Appellant's due process rights. These causes in no way are redundant to the issue of legal malpractice.

1. Negligence:

Plaintiff alleged negligence under their legal malpractice cause and negligent misrepresentation under a separate cause of action. The issue of negligence, including contributory negligence, are not ordinarily susceptible of summary adjudication for the reason that even though there may be no dispute about how a personal injury occurred, the presence or absence of negligence often remains a question of fact which requires a trial under traditional principles of the law of negligence. Newly discovered evidence and testimony to be offered in this cause of action by an expert witness showing gross negligence by the Defendants, which in effect denied Plaintiff over $2 million dollars in economic benefits.. See Blixton v. MacNary, 23 App. Div 2d 573, 256 NYS2d 362, also See Petros v. Kellas, 146 W. Va 619, 122 SE2d 177, also Levine v. Behn 282 NY 120, 25 NE2d 871, also See Pacesetter Communications Corp. v. Solin & Breindel, P.C., 150 A.D.2d 232, 233, 542 N.Y.S.2d 404 (1989).

2. Contract Construction and Breach of Contract:

This is a genuine issue of material fact that can only be resolved on parol evidence and is a triable issue. The dispute on the construction of an ambiguous contract according to the intention of the parties is a question that cannot be decided on affidavits under summary judgement procedure. See Borrelli v. J.H. Taylor Const. Co. (Sup) 37 NYS2d 150 also See Russell v. Lopez (City Ct) 16 NYS2d 595, affd 259 App Div 885, 20 NYS2d 1016.

3. Fraudulent Misrepresentation & Concealment:

This is a genuine issue of material fact and is a triable issue. A summary judgement is particularly inappropriate where the inferences that the parties seek to have drawn deal with motive, intent, consciousness, conscience and subjective feelings and reactions. See Cross v. United States (CA2 NY) 336 F2d 431

4. Intentional Infliction Of Emotional Distress:

This is a genuine issue of material fact and a triable issue. The complaint is laced with facts which support this cause of action as finally set out in paragraphs 58 and 59 of Plaintiff's complaint. This issue deals with motive and intent. See Alabama G&R Co. v. Louisville & N&R Co. (CA5 Ala) 224 F2d 1, 50 ALR2d 1302.

34. These material facts and issues should not have been dismissed in summary judgment.

ISSUE NO. 5: THE COURT PROTECTED THE FRATERNITY RELATIONSHIP OF LAWYERS AND DENIED APPELLANT'S CONSTITUTIONAL RIGHTS AS THE COST.

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35. Should the Court quickly decide this issue is a conclusory decision by the Appellant, the Court will note the well researched series alluding to lawyer politics in the Judicial system, which series was published in September 1999 by "Newsday". The entire six day series is retrievable on the Internet from www.newsday.com.

36. Newsday states; "Over the past nine months, Newsday has examined closely the partisan process that has

spawned the 89 elected Supreme and County Court judges who preside over Long Island's most serious civil and criminal cases. Through more than 200 interviews with lawyers, politicians, court employees and the judges themselves, as well as in a detailed computer analysis of state court and campaign records, a picture has emerged of a system that is scrupulously inbred."

37. Appellant in this case joins millions of other non-lawyer pro se litigants in America who have experienced blatant bias and prejudice by a lawyer controlled system of justice who view the non-lawyer pro se litigant as an intruder who needs to be disposed of quickly-even if judges have to disregard or tamper with the evidence.

ISSUE NO. 6: FRAUD UPON THE COURT BY LAWYERS IN CONCERT WITH GOVERNMENT OFFICIALS VOIDS JUDGEMENT OR ORDER

---

38. This Court is asked to take note of the fraud perpetrated upon the "Alpert Court" through deception and mis-representation by pleadings of the Queller and Fisher law-firm in the underlying case (also on appeal before this Court). The Queller and Fisher law firm filed an "Affirmation In Support" and asked the Court to accept as "factual", the following in that Affirmation;

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concealment)

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Page 29, Paragraph 3 (Non-disclosure and concealment)

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Page 31, Paragraph 3 (False and Misleading)

Page 32, Paragraph 1 (Misleading)

Page 35, Paragraph 1 (False and Misleading)

Page 35, Paragraph 2 (False and Misleading)

Page 36, Paragraph 1 (False and Misleading)

Page 36, Paragraph 3 (Non-disclosure and concealment)

Page 37, Paragraph 4 (False and Misleading)

39. The Court's assumption of subject matter jurisdiction on an issue with Appellant alleging fraud upon the Court with specificity directly "set up" the instant cause for dismissal on summary judgement by the same judge disregarding the fraud. The Court joined in that fraud and used that as a basis for it's Order thereby acting with disregard in a manner violating Appellants civil and constitutional rights. See Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct 1683, 1687 (1974). Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987). Also See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). The order should be declared void.

ISSUE NO. 7: CASE LAW RELIED UPON FOR SUMMARY JUDGEMENT WAS NOT RELEVANT AND OTHERWISE FAULTY

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40. The case law relied upon as basis for summary judgement in this case did not target the rules, laws and issues.

1. Altmore v. Friedman:

This case law supports the Appellant's case. The case refers back to a fee Arbitration and an arbitration award. Appellant concurs and points out there was no prior Arbitration hearing and award in Appellant's case. There was no fair and full opportunity given for the issue on merits, which precludes the application of res judicata and collateral estoppel. These doctrines require a prior action to be litigated and heard on merits.

2. Kagan Meat and Poultry v. Kalter

This case law again refers to an underlying action on the issue with a full hearing of record with complete testimony taken. Appellant again points out there was no prior hearing of record. There was no fair and full opportunity given for the issue on merits, which precludes the application of res judicata and collateral estoppel.

3. Chisholm-Ryder Company, Inc. v. Sommer & Sommer;

This case law again refers to an underlying action on the issue with an account of record between the attorney and client. Such is not the case in this cause of action. Appellant alleged fraud and forgery of a retainer agreement which issue was not litigated in a former lawsuit. There was no fair or full opportunity given the Plaintiff to litigate the issue on merits, which precludes the application of res judicata and collateral estoppel.

4. Hutton v. County of Rockland

Unable to locate this case law. Apparently used in the same context as Defendants case law in 1,2,3 above.

5. John Grace & Co. Inc. v. Tunstead, Schechter & Torre:

This case law does not support the Defendants case for summary judgement. This case provided full and fair opportunity to ligate the issues. Appellant did not have that opportunity.

6. Sage Realty Corporation v. Proskauer Rose LLP

This case law rightly points out that res judicata only bars subsequent litigation "where the same foundation facts serve as a predicate for each proceeding". See Reilly v. reid 45 N.Y.2d 24, 30, 407 N.Y.S.2d 172). Appellant's complaint alleged a number of triable issues never before litigated.

7. White of Lake George Ins. v. Bell

This case law is not applicable to the instant cause. Appellant alleged fraud with specificity which is separate and apart from the legal malpractice issues. It should be noted by the court that the facts remaining aside from the issue of legal malpractice were negligence, fraud and intentional infliction of emotional distress in this case which were triable causes and precluded summary judgement.

8. Weiss v. Manieli

It should be noted by the Court in this case that

collateral estoppel attached to some issues in this case because party had a full and fair opportunity to contest prior determination. Such is not the case in the Instant cause of action. It should also be noted by the Court that the negligence issue in legal malpractice was a fact issue and did not have preclusive effect.

9. Mecca v. Shang

This case law is similar to #7 above and does not apply in the instant cause for the same reasons given.

10. C.G. Glatter v. Chase Manhattan Bank

Defendants use of this case law to address punitive damages is misplaced. Plaintiff's have alleged facts sufficient to justify an award of punitive damages, demonstrating egregious and outrageous conduct by the Defendants. The conduct by Defendants shows a pattern of similar conduct directed at the public generally.

11. Rocanova v. Equitable Life

This case law is similar to #10 above and does not apply in the instant cause for the same reasons given.

41. The laws and/or rules referred to in the Order of the Court against legal malpractice are unconstitutional denying due process of recovery for personal injury and is a violation of U.S. Constitution Amendment I, V, and XIV equal protection of the law rights. To protect one select group from wrongdoing violates our constitutional right to equal protection of the law under Amendment XIV.

CONCLUSION

The argument of the issues are clear and will not be re-argued in this conclusion. Appellant concludes there are two major considerations, (1) Rules and Laws Issue and (2) Constitutional Issue.

1. RULES AND LAWS ISSUE

In a medical malpractice action against a hospital, after the Plaintiff settled a prior action against both drivers involved in the accident which resulted in his injuries after judgement had been rendered, this settlement would not support summary judgement in favor of the hospital in the later proceeding by collateral estoppel, where the record of the prior proceeding indicated that the settlement was being entered into merely to collect the maximum amount of insurance coverage, where in the prior proceeding neither the issue of the hospital's liability nor the issue of full compensation of the plaintiff was determined by the prior judgement. See Arthur v. Evangelical Deaconess Soc. (Mo App) 615 SW2d 438.

The doctrine of res judicata was never intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed and new facts have occurred which may have altered the legal rights or relations of the litigants. See Hurd v. Albert 3 P.2d 545, 549 (Cal. 1931).

Defendants argument is faulty. Their argument and case law (1) refers to fee disputes which arose before an action was concluded and otherwise (2) issues that received a full and fair hearing on merits or fee arbitration where the doctrine

of res judicata or collateral estoppel was applicable.

As cited in the instant cause of action, the fee dispute (1) arose after the underlying action was concluded and (2) the issue did not receive a full and complete hearing on merits and no fee arbitration hearing was had on the issue.

Newly discovered evidence could not have been presented and litigation was not afforded Plaintiff to resolve the dispute on merits with judicial determination as required by res judicata and collateral estoppel.

Defendants have relied entirely upon the doctrine of res judicata and collateral estoppel for summary judgement which is not applicable in the instant cause of action.

Defendants have not met the burden of proof that genuine issues and material facts remain outside the res judicata and collateral estoppel doctrine as required under FRCP and States Rule 56.

The Defendants have not shown that they are entitled to summary judgement.

It is the movant's burden to introduce sufficient evidence for the court to determine that the doctrine of res judicata and collateral estoppel is applicable. That failing, they have not shown the absence of genuine issues and material facts remaining in the instant cause of action. The Defendants have failed to prove it's burden as required. The Motion for summary judgement should have been denied.

The Court must view underlying facts in light most favorable to non-moving party when

ruling upon summary judgement motion. See Quinn v. Syracuse Model Neighborhood Corp. (1980, CA2 NY) 613 F2d 438.

2. CONSTITUTIONAL ISSUE

Appellants have had their constitutional rights repeatedly ripped from them by judges who tamper the evidence, judges who cook the judicial books with faulty case law to arrive at a desired prejudicial opinion. Yes judges who flow with the lawyer control of justice with non-lawyer litigants branded as an intruder and banished in discriminatory fashion to the back of the judicial bus. These constitutional due process violations evolved from a judge who should have disqualified himself in an underlying cause and certainly in the instant cause. A disregard of fraud upon the Court is a serious issue and any Order coming out of that illegal activity should be declared void. See Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987). Also See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

COPY

ARGUMENT
NOT REQUESTED

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-- SECOND DEPARTMENT

ARTHUR BEST and DEBRA BEST

Plaintiffs-Appellant

vs. Case No. 1999-10398

SEARS ROEBUCK and CO., WATERLOO Division INDUSTRIES, INC.,MASTERBRANDS INDUSTRIES, INC. and AMERICAN BRANDS, INC.,

Defendants-Respondent

ARGUMENT OF THE ISSUES

ISSUE NO. 1: DENIAL OF STANDING AND STATUS TO APPELLANT, AS A PRO SE LITIGANT , HIS CONSTITUTIONAL RIGHT TO SELF REPRESENTATION

---

1. This appeal addresses the continuous due process violations of Appellant. The Court is asked to take notice that all judicial laws and rules are subordinated to the clear reading of the U.S. Constitution, which Constitution all judicial officers have sworn to uphold under Title 28, Sec. 453. The Courts cannot go behind the Constitution and by any original standard judge the justice or legality of any single one or more of the provisions therein. The judiciary is but the creature of the Constitution and it cannot judge it's creator. See: Ex parte Newman, 9 Cal 502 & Ex parte Andrews 18 Cal 678. There is an abundance of case law on the subject of interpolation and additions to the U.S. Constitution. See: United States v. Sprague, 282 US 716, 51 S. CT 220 and Sandelin v. Collins, 1 Cal2d 147 and Ervin v. Collins 85 So 2d 852 and Platte Valley Public Power & Irrig. Dist. v. Lincoln County, 144 Neb 584.

2. Clearly the denial of self-representation for Appellant upon his Entry of Appearance reverses a clear reading of the U.S. Constitution Amendment IX and X and XIV Section I. This denial subordinates the U.S. Constitution to judicial laws and rules and thereby denies Appellant of his constitutional rights through the use of the lawyer "rules mentality". See 17 U.S. Statute At-Large 13, an act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes;

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person who, under color of law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person within the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States,

shall any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.....under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases." (17 Statute At-Large 13)

3. The judicial order being appealed in this case actually employs the use of judicial (case law) and judicial rules practice to overcome the clear reading of the U.S. Constitution and deny the civil and constitutional rights of Appellant.

ISSUE NO. 2; DENIAL OF A MEANINGFUL HEARING ON A SUBSTANTIVE ISSUE IN THE CASE.

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4. This issue assumes the Court has subject matter jurisdiction which is questioned in issue #5 below.

5. If the Court did have subject matter jurisdiction over the issue of a fee dispute between Appellant and law firm, then such jurisdiction is the authority to hear and determine the issue. In the alternative the judgement or order lacking subject matter jurisdiction is void.

6. Assuming the Court could take subject matter jurisdiction, that authority dictates a meaningful hearing to determine the issue. The denial of Appellant a meaningful hearing on the subject matter was a constitutional violation of

Appellant's due process rights.

7. This Court is asked to take note of the fraud perpetuated upon the "Alpert Court" through deception and mis-representation by pleadings of the Queller and Fisher law firm. The Queller and Fisher law firm filed an "Affirmation In Support" and asked the Court to accept as "factual", the following in that Affirmation;

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Page 37, Paragraph 4 (False and Misleading)

8. The Court should not have assumed subject matter jurisdiction on an issue of this magnitude, especially when the Appellant alleged fraud upon the Court. Yet the Court joined

in that fraud and used that as a basis for it's Order without a hearing on the merits, thereby acting with disregard in a manner violating Appellants civil and constitutional rights. See Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct 1683, 1687 (1974)., Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987). Also See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

ISSUE NO. 3; COURT BASED IT'S DECISION UPON A FRATERNITY RELATIONSHIP OF LAWYERS. TO SAFEGUARD THAT RELATIONSHIP, THE COURT DENIED THE NON-LAWYER APPELLANT HIS CONSTITUTIONAL RIGHTS.

---

9. Should the Court quickly decide this issue is a conclusory decision by the Appellant, the Court will note the well researched series alluding to lawyer politics in the Judicial system, which series was published in September 1999 by "Newsday". The entire six day series is retrievable on the Internet from www.newsday.com.

Newsday states; "Over the past nine months, Newsday has examined closely the partisan process that has spawned the 89 elected Supreme and County Court judges who preside over Long Island's most serious civil and criminal cases. Through more than 200 interviews with lawyers, politicians, court employees and the judges themselves, as well as in a detailed computer analysis of state court and campaign records, a picture has emerged of a system that is scrupulously inbred."

10. Appellant in this case joins millions of other non-lawyer pro se litigants in America who have experienced

blatant bias and prejudice by a lawyer controlled system of justice who view the non-lawyer as an intruder who needs to be disposed of quickly-even if judges have to disregard or tamper with the evidence.

ISSUE NO. 4; ORDER OF THE COURT NOT SUSTAINED OR SUPPORTED BY THE PLEADINGS

11. The pleadings of record in this case will show the evidence in no way supports the decision and order. Appellant alleges not only does the Case law cited by the court fail to support the Order but the Order relies upon several misstatement of "facts" to arrive at a "back door" decision and order. In the November 1990 issue of Legal Times Monroe Freeman , the Howard Lichenstein Distinguished professor of Legal Ethics at Hofstra University Law School has virtually written about this case with the title "When Judges Tamper With The Evidence". Professor Freedman stated in an address to the Seventh Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit; "I have had my fill of judicial opinions that bear no relationship to the cases that were filed and argued. I am tired of opinions that falsify the facts of the case and that disingenuously use or omit the legal precedents." Professor Freeman then was taken aback by a statement in response from a federal appellate judge who said; "You don't know the half of it." The article continues with several instances of outright fraud and corruption by judges even at the appellate level of the judiciary.

12. Appellant filed a Petition or Motion for Reconsideration of the Court findings. In this document Appellant attempted to get the Court to focus upon the

pleadings previously filed by Appellant and upon the issues outlined in those pleadings. The end result of that Motion for Reconsideration was the same as with prior pleadings, a disregard of the facts and issues raised by pro se Appellant in the case with a pre-disposition to accept the pleadings of the lawyer over the non-lawyer, even when numerous mis-representations were spotlighted in those pleadings by Appellant.

13. This Court is asked to take note of circuit court ruling which held that a pro se complaint requires less stringent reading than one drafted by a practicing lawyer. See Puckett v. Cox 456 F2d 233 (1972 Sixth Circuit USCA)

14. The Court is also asked to take note that Justice Black stated; "The federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of the pleading is to facilitate a proper decision on the merits", See Conley v. Cox, 355 U.S. 41 at 48 (1957).

15. According to Rule 8(f) FRCP, all pleadings shall be construed to do "substantial" justice. Regardless of the constitutional issues raised on this appeal, substantial justice was not a consideration of the Court on pleadings of Appellant in the lower court.

ISSUE NO. 5: SUBJECT MATTER JURISDICTION OF THE COURT IS QUESTIONED ON AN ISSUE NOT IN LITIGATION BEFORE THE COURT.

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16. The Courts have broad judicial discretion in cases of conspiracy to commit civil rights violations, with great

legal precedent to subordinate generic rules to enforcement of the laws and rights of the U.S. Constitution. The question of subject matter jurisdiction may be raised for the first time on Appeal, See Lewis v. Superior Court, 21 Cal. App.2d 102, 104, 78 P.2d 220, 222 (1937)

17. Appellant questions the jurisdiction taken by the court of subject matter not in litigation before the court. Appellant brought the issue to the Court's attention only to assist the court in arriving at an equitable decision on subject matter before the Court.

18. The same issue was later litigated in a separate lawsuit while the judge factored in the subject matter in the instant Order being appealed.

19. Appellant merely called to the attention of the Court a fee dispute which existed between Appellant and his law firm, asking the court to escrow funds in the instant cause until the dispute was litigated or settled in order to do substantial justice in the instant cause.

20. The Court then took subject matter jurisdiction of that issue and decided the issue upon it's own judicial discretion without a meaningful hearing on the issue.

21. No legal logic or reasonable mind would believe that such an action would show anything but bias and prejudice toward the Appellant, a non-lawyer pro se litigant and favor toward the lawyer. This is blatant prejudice, abuse of judicial discretion and judicial error to permit a lawyer to gain a certain relief or advantage, which has not been litigated, or even requested in their prior pleadings, which relief should be requested and litigated as a separate lawsuit.

22. Appellant believes the Court assumed wrongful subject matter jurisdiction in a lack of subject matter jurisdiction, which subject matter was not in litigation before the Court. In the absence of subject matter jurisdiction, the order should be voided.

ISSUE NO. 6: JUDGE ALPERT SHOULD HAVE DISQUALIFIED HIMSELF UNDER TITLE 28, USC, SECTION 455 (a), APPEARANCE OF BIAS AND PREJUDICE

---

23. When fraud by a lawyer upon the Court was alleged by Appellant in this case, this judge disregarded that specific allegation and gave the appearance of bias and prejudice toward the Appellant. The subsequent actions by this judge clearly showed he would do whatever necessary to take the side of lawyer representation v. non-lawyer pro se representation. The actions of this judge included questionable assumption of jurisdiction on the issue, denial of a meaningful hearing on the issue, disregard of the fraud perpetuated on the Court. Use of judicial discretion to settle the issue on that basis rather than allow due process for the Appellant and decide the issue on the merits clearly showed bias and prejudice.

24. The Order issued by Judge Alpert in this case reveals the same bias and prejudice toward Appellant which prevailed in pleadings on the issue-even to mis-statement of facts to support the Order.

25. This judge had already been noticed that a separate action would be maintained by Appellant. This judge knew if he made a ruling of the nature of the Order, Appellant would have difficulty coming back in with a legal malpractice

action against the law firm. Not only did this judge issue the Order but he also presided over the malpractice litigation to deny that action by reason of his previous Order in the instant cause.

26 This judge had a duty to disqualify himself under Title 28, USC, Section 455. The appearance of bias and prejudice was more than obvious, it was blatant. When this judge saw he was coming into conflict with the superior authority of the Federal Constitution, he should have disqualified himself rather than being stripped of his official representative character and be subject to the consequences of his individual conduct. See Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct 1683, 1687 (1974).

CONCLUSION

Appellants have had their constitutional rights repeatedly ripped from them by judges who tamper the evidence, judges who cook the judicial books with faulty case law and misstate the facts to arrive at a desired prejudicial opinion. Yes judges who flow with the lawyer control of justice with non-lawyer litigants branded as an intruder and banished in discriminatory fashion to the back of the judicial bus. Such actions resemble no more or no less the discriminatory banishment of the blacks to the back of the bus in the 1940's. When lawyers in concert with government officials acting under color of law commit fraud upon the Courts as was the history of this case, Appellant is entitled not only to litigation but also a redress of the constitutional violations visited upon the Appellant as a result of this fraud upon the Courts. Browning v. Navarro, 826 F2d 335, 342-45 (5th Cir. 1987). Also See Hazel-Atlas Glass Co. v. Hartford-

Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

When a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." See; Scheuer v. Rhodes, 416 U.S. 232, 94S.Ct. 1683, 1687 (1974)

A clear reading of each issue on appeal and unbiased reading of the argument on those issues will show Appellant was not only subjected to constitutional due process violations but was victimized by fraud upon the Court by lawyers with the Court joining in that fraud. These issues demand a trial on merits.

Supreme Court, U.S.
FILED
DEC 7 2001
CLERK

No. 01-636

IN THE

Supreme Court of the United States

ARTHUR BEST and DEBRA BEST,

Petitioners,

v.

SEARS ROEBUCK AND CO., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENTS QUELLER & FISHER AND FRED QUELLER

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COUNTER STATEMENT OF FACTS

Plaintiffs-Petitioners Arthur Best and Debra Best (hereinafter, "Petitioners") combine two separate actions in their Petition for a Writ of Certiorari. The first action is a personal injury action against Respondents Sears Roebuck and Co. and others. The second action is a legal malpractice action against respondents Law Firm of Queller and Fisher and Fred Queller (hereinafter, "Queller & Fisher"). Each action is summarized below.

A. *Action Number One: The Personal Injury Action*

Petitioner Arthur Best was injured when he was struck by a flexible rod from a tool chest he was using. *See* Short Form Order dated March 24, 1999 of Hon. Bruce Alpert (annexed as "COPY O-9" to Petitioners' Petition for Writ of Certiorari) at page 3. He and his wife then retained Queller & Fisher to represent them in connection with a personal injury action against Sears Roebuck and others who were responsible for manufacturing, distributing or selling the tool chest which caused the injury. *See id.* at p. 4.

The personal injury action, brought in the Supreme Court of the State of New York, was eventually settled in open court for 1.75 million dollars. *See id.* at p. 6. Following the settlement, Petitioners attempted to have the settlement proceeds paid only to them, and not to Queller & Fisher. *See id.* at pp. 10-11. The attorneys for Sears filed a motion asking the court to direct them as to the manner of distribution of the settlement proceeds, and Queller & Fisher filed a cross-motion for an order directing the payment of its fee. *See id.* at pp. 1-3.

The presiding judge held that Queller & Fisher was entitled to its one-third fee in accordance with the parties' retention agreement. *See id.* at pp. 16-19. Petitioners filed a motion to reargue that determination, but the motion was denied. *See* Short Form Order dated August 5, 1999 of Hon. Bruce Alpert (annexed as "COPY O-8" to Petitioners' Petition for Writ of Certiorari).

Although Petitioners received their share of the settlement proceeds and discontinued the action against Sears and the other Respondents, they nevertheless appealed the order denying the motion to reargue. The Appellate Division dismissed the appeal, holding that no appeal lies from the denial of a motion to reargue. *See Best v. Sears Roebuck & Co.*, 278 A.D.2d 350, 718 N.Y.S.2d 610 (2d Dept. 2000).

Petitioners then filed a motion to reargue the Appellate Division's determination, or in the alternative, for leave to appeal to the Court of Appeals. *See Best v. Sears Roebuck*, No. 1999-10398 (2d Dept., March 14, 2001) (annexed as "COPY O-2A" to Petitioners' Petition for Writ of Certiorari). The motion was denied by the Appellate Division. *See id.*

B. ***Action Number Two: The Malpractice Action***

Petitioners also commenced an action against Queller & Fisher, asserting claims of legal malpractice, breach of contract, negligent misrepresentation, indemnification, fraudulent misrepresentation, fraudulent concealment of material facts, and punitive damages. *See* Short Form Order dated October 14, 1999 of Hon. Bruce Alpert (annexed as "COPY O-7" to Petitioners' Petition for Writ of Certiorari) at pages 4-5.

The action was dismissed on the grounds that the malpractice claim was barred because (1) the order from the underlying

personal injury action necessarily determined that there was no malpractice and (2) the remaining claims were merely redundant pleadings of the malpractice claim. *See id.* at pp. 5-6.

Petitioners appealed to the Appellate Division, which affirmed the order dismissing the action. *See Best v. Law Firm of Queller and Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2d Dept. 2000).

Petitioners filed a motion to reargue the Appellate Division's determination, or in the alternative, for leave to appeal to the Court of Appeals. *See Best v. Law Firm of Queller and Fisher*, No. 1999-10393 (2d Dept., March 14, 2001) (annexed as "COPY O-2" to Petitioners' Petition for Writ of Certiorari). That motion was also denied by the Appellate Division. *See id.*

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF WHICH PETITIONERS SEEK REVIEW WERE NOT RENDERED BY THE HIGHEST COURT OF THE STATE OF NEW YORK IN WHICH A DECISION COULD BE HAD, AND THEREFORE, THE COURT LACKS CERTIORARI JURISDICTION TO REVIEW THOSE DECISIONS

Section 3 of the Supreme Court Case Selections Act grants the Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had." *See* 28 U.S.C. § 1257(a) (West 1993). Since Petitioners did not exhaust their appellate remedies within the courts of the State of New York, the decisions and orders of which they seek review were not rendered by the highest court of New York in which a decision could be had.

In both the underlying personal injury action and malpractice action, Petitioners filed motions in the Appellate Division seeking leave to appeal to the New York Court of Appeals from the unfavorable Appellate Division orders.

Once the Appellate Division denied Petitioners leave to appeal to the Court of Appeals, Petitioners could have moved for leave to appeal in the Court of Appeals itself. Section 5602(a) of New York's Civil Practice Law and Rules ("CPLR") provides that "[a]n appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application." *See* CPLR § 5602(a) (McKinney 1995); *see also* Siegel, *New York Practice., Third Ed.*, § 528, at page 866 (West 1999).

Petitioners could also have taken an appeal as of right to the Court of Appeals. Section § 5601(b) of the CPLR provides as follows:

> An appeal may be taken to the court of appeals as of right: (1) from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and (2) from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

See CPLR § 5601(b) (McKinney 1995).

Since the Appellate Division orders which Petitioners challenge were not "rendered by the highest court of a state in which a decision could be had," *see* 28 U.S.C.A. § 1257(a), the Petitioners' petition for writ of certiorari should be dismissed for want of jurisdiction. *See Sandquist v. California*, 419 U.S. 1066, 95 S. Ct. 651, 42 L. Ed. 2d 662 (1974) [citing *Banks v. California*, 395 U.S. 708, 89 S. Ct. 1901, 23 L. Ed. 2d 653 (1969)].

The procedural history of the case at bar is similar to that of *Southern Electric Co. v. Stoddard*, 269 U.S. 186 (1925). In *Southern Electric*, the petitioner sought to challenge an order of the Appellate Division of the Supreme Court of the State of New York. *See id.* at 188. After losing in the Appellate Division, the petitioner made an application to the Appellate Division to certify a question of law to the Court of Appeals, but the Appellate Division declined to do so. *See id.* The petitioner did not thereafter file an appeal with the Court of Appeals or seek permission to appeal from the Court of Appeals. *See id.* at 189. The Court concluded that the petitioner "failed to make proper application to the state court of final resort," *see id.* at 190, and dismissed the writ of certiorari. *See id.*

The case at bar is also similar to *McMaster v. Gould*, 276 U.S. 284 (1928). In *McMaster*, the petitioners' action was dismissed by the trial court, and the dismissal was affirmed by the Appellate Division of the Supreme Court of the State of New York. *See id.* at 285. The petitioners then unsuccessfully moved the Appellate Division for leave to appeal to the Court of Appeals. *See id.* They did not, however, make the same motion in the Court of Appeals. *See id.* at 285-286. The Court held that "since the petitioners, when the Appellate Division refused their leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest

court of the State in which a decision could be had." *See id.* at 286-287 [citing *Newman v. Gates*, 204 U.S. 89, 95 (1907)]. The Court dismissed the writ of certiorari for want of jurisdiction. *See id.* at 287 .

It is respectfully submitted that the Court lacks jurisdiction over the instant matter for the same reasons it lacked jurisdiction in *Southern Electric* and *McMaster*.

II. PETITIONERS' PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT "AN IMPORTANT FEDERAL QUESTION" WHICH WOULD WARRANT THE COURT'S REVIEW.

Petitioners' appeal in the underlying personal injury action was dismissed because, under New York's procedural rules, "no appeal lies from an order denying reargument." *See Best v. Sears Roebuck & Co.*, 278 A.D.2d at 350, 718 N.Y.S.2d at 610. The state court did not address any substantive issues, let alone any important federal questions.

The appeal in the malpractice action also did not involve any important federal questions. In that appeal, the Appellate Division found that a prior finding that the attorneys were entitled to their agreed-upon legal fee "necessarily decided that there was no malpractice," thus precluding Petitioners' malpractice action. *See Best v. Law Firm of Queller and Fisher*, 278 A.D.2d at 441, 718 N.Y.S.2d at 397.

Rule 10 of the Rules of the Supreme Court of the United States provides a statement of the character of the reasons the Court will consider in deciding whether to grant a petition for a writ of certiorari. The non-exclusive list provided by the Court includes situations where "a state court of last resort has decided

an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals," and where a State Court "has decided an important question of federal law that has not been, but should be, settled by this Court." *See* U.S. Sup. Ct. R. 10 (emphasis added).

There is nothing in Petitioners' Petition for a Writ of Certiorari which suggests the presence of a "question of federal law" or "federal question," let alone an important federal question or important question of federal law. Under the circumstances, even if the Court possessed certiorari jurisdiction, it should decline to exercise such jurisdiction. *See Zucht v. King*, 260 U.S. 174, 176 (1922) ("[I]t is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not . . . substantial in character").

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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